Analysis of the Chief's Decisions on Selected Appeals

Final Report

Malcolm Kirby and Stephen Laner

September 1989

PSW Station
USDA Forest Service
Berkeley, California

LIBRARY COPY
ROCKY MT. FOREST & RANGE
EXPERIMENT STATION

ANALYSIS OF THE CHIEF'S DECISIONS ON SELECTED APPEALS

FINAL REPORT

Malcolm Kirby and Stephen Laner

September 1989

PSW Station

USDA Forest Service

Berkeley, California

LIBRARY COPY
ROCKY MT. FOREST & RANGE
EXPERIMENT STATION

ANALYSIS OF THE CHIEF'S DECISIONS ON SELECTED APPEALS

EXECUTIVE SUMMARY

Malcolm Kirby and Stephen Laner

Background and Purpose of Study

It has only recently been realized that the Chief's appeal decisions may have implications for the agency's policy -- policy being defined as "a governing principle or set of principles intended to guide or determine the future actions of an individual or an organization". The purpose of the study being reported here was to search a sample of the Chief's appeal decisions for statements having policy implications. And if such statements could be found, to propose ways of disseminating them, preferably through the Directive System.

There are several reasons why appeal decisions that have policy implications should be captured and disseminated. Two of the most important ones are the increasing frequency with which such decisions are cited in the course of litigation, and inadvertent misinterpretations by the field of the Chief's intent behind the appeal decision.

The study was undertaken at the behest of the Deputy Chief for NFS, and was conducted by Malcolm Kirby, Region 5, and Stephen Laner, PSW Station. The sample examined was made up of 40 appeal decisions selected by the Washington Office Land Management Planning, Timber Management, Lands, Recreation and Engineering Staffs.

Findings

Statements in the Chief's appeal decisions were considered to have policy implication if they **"substantially modify existing policy contained in the Directive System, or if they clarify or supplement existing policy".** Almost 50 such statements were found, some of them appearing in more than one appeal decision, often with marked and significant variations in wording. Some were found to have been expanded by subsequent litigation. Most of the statements were in the form of clarifications or additions to existing policy, with relatively few warranting changes or amendments to the FSM.

Only one appeal decision was found to cite a previous appeal decision which may testify to the need for systematic collection. This need is further underlined by the finding that citations from the Chief's appeal decision can have a telling effect in litigation. Examples of recent cases that were demonstrably influenced by appeal decisions are quoted and discussed in the report.

Some appeal decisions are broad in scope of applicability, covering a wide range of conditions or circumstances, but many tend to be narrow in scope, applying in a limited context only. For most past appeal decisions the scope of applicability cannot be easily inferred. As to whether an appeal decision warrants a change to the FSM, the significance of the implication is a more important determinant than scope of applicability.

It was further found that the complexity of appeals is not diminishing.

Locating policy implications of past appeal decisions requires separating those decision statements that modify, clarify, expand or supplement existing policy from those that merely reiterate it. The skills and knowledges involved in this task are probably not the same as those required for determining the policy implications of a new appeal decision as it is being drafted. But writers of future appeal decisions who rely on past appeal decisions as references can be expected to encounter similar problems to those faced by the authors of this study.

Recommendations

1) Complete and continue the scrutiny of **past** appeal decisions for policy-relevant statements. Adopt the format used in this study for presenting the results of the search. Use the procedure and criteria developed by the authors by answering the following questions:

> **Does the wording of the statement suggest a significant departure from, or a substantial modificaion of, existing policy?**
>
> **Does the wording of the statement appear to clarify, expand or supplement existing policy?**

As to the scope of applicability of an appeal decision, try to answer the question:

> **How broadly applicable did the Chief <u>intend</u> this decision statement to be?**

2) For appeal decisions that warrant a change in the FSM, assign the responsibility for initiating the change to the reviewing officer . (A sample policy letter is included in the study report).

3) For appeal decisions that appear to clarify, expand or supplement existing policy, include the following supporting material in the appeals data base:

> An extended summary of the policy implications related to each issue covered by the appeal decision;
>
> Copies of background documents that are directly related to appeal issues, such as memos from the Chief and reviews by the Secretary;
>
> Cross references to relevant prior appeal decisions and to pending or completed litigation.

4) As a trial, send a circular letter to the field containing the decisions analyzed in this report. If the response indicates that these analyses are useful, take steps to continue such work and encourage the field to participate in supplying supplemental material to the appeals data base.

PREFACE

This report is the sixth in a series of reports on appeals and litigation that began in 1986. During the first two years, at the behest of the then Deputy Chief of the National Forest System, the authors undertook an examination of the Forest Service's experience with appeals and litigation of environmental decisions. The emphasis in the five reports was on litigation rather than appeals (For titles and synopses of the reports see APPENDIX A). It is true that few appeals of Forest Service decisions ever end up in the Courts. Yet the National Environmental Protection Act (NEPA), the act most often cited in disputes over environmental decisions, has evolved through judicial opinions rather than through Congressional amendments. This is why understanding NEPA requires the study of federal case law. Ignorance of environmental case law by Forest Service people has in the past sometimes put the Service at a critical disadvantage in the Courts when faced by the active agents in the environmental organizations, lawyers almost to a man -- and woman.

Both in administrative appeals and in litigation, citations by appellants' attorneys of the wording lifted from the Chief's prior appeal decision letters (with minor exceptions, the Chief's decisions are final) are a more recent development. In doing so, the attorneys either suggest or openly assert that some of the language cited is, or at least reflects, Forest Service policy. In their turn too, attorneys from the Office of General Counsel and the Department of Justice, have on occasions cited the Chief's appeal decisions before the Courts as representing policy. In any event, there is now no turning back, and the question who started the ball rolling is not important. Parenthetically it is worth noting that the Forest Service has the initial advantage in the Federal Courts: in matters of policy certainly, judges are strongly inclined to defer to the government's position.

The time has come to acknowledge that appeal decisions have become a potential source of additions and changes in existing policy. Because this realization is of recent date, the additions and changes to policy stemming from appeal decisions have so far not been codified in the Directive System -- the Forest Service Manual and Handbook, including Regional Handbooks, Interim Directives and Regional Supplements. The Directive System, it hardly needs to be stated, serves as the mechanism or vehicle by which policies are circulated throughout the agency and made available to our affected publics. Briefly stated, the purpose of the study reported here was to search a sample of the Chief's appeal decisions for statements having policy implications, and propose ways of disseminating such statements.

ACKNOWLEDGEMENTS

The study was undertaken at the behest of Jim Overbay, Deputy Chief, as recommended by the study's coordinator, Larry Hill, NFS Staff Assistant for Operations. Larry took an active interest in the study throughout, and we benefited greatly from his advice and comments on the report drafts.

Financial support for the study was shared between the Washington Office Land Management Planning, Timber Management, Lands, Recreation, Engineering and NFS Operations staffs. We are grateful to Staff Directors Everett Towle, Dave Hessel, Jerry Sutherland (acting at the time the study was commissioned), John Butruille and Sterling Wilcox for approving the fund authorizations.

Among those who selected the administrative appeals used in the study and contributed suggestions we would like to give special mention and thanks to Larry Larson, Jerry Jeansonne, Kathie Hauser, Roy Droege and Glenn Bergey. Jim Perry and Mike Gippert of the OGC provided us with valuable interpretations of the links between NFMA and NEPA. Professor Dennis Teeguarden kindly allowed us to draw on his analysis of some 13 NFMA requirements which he construed as decision categories for forest planning. An unpublished working paper by Fred Norbury introduced us to the important issue of what decisions are made in the Land and Resource Management Plans, and we also relied on Jim Morrison's excellent Digest of Appeal Decisions related to Forest Plans. Barbara Timberlake could always be depended on to respond promptly to our numerous, and often sketchy and confused, requests for copies of the Chief's LMP appeal decisions.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
FINDINGS	3
RECOMMENDATIONS	8
REFERENCES: List of Sample Appeals by National Forest and Appeal Number Judicial Reviews Other References	11
APPENDIX A: Synopsis of Prior Reports in this Series	14
APPENDIX B: Policy Implications of Appeal Decisions by Issue (See List of Decisions below)	16
APPENDIX C: Proposed Interim Directive for initiating Changes in FSM (For Use by Reviewing Officers)	68
DECISIONS ANALYZED IN APPENDIX B:	
1. DECISIONS PERTAINING TO LAND AND RESOURCE MANAGEMENT PLANS	16 - 42
Some Decisions are made in the LRMP and some are deferred to the Project Level Stage	16
Allowable Sale Quantity is not a Mandatory Value	18
Choice of Silvicultural Management System in LRMP is not final	20
Non-Wilderness Allocations do not mandate Development of Roadless Areas	21
Analysis of Issues related to Maintaining Species Diversity	23
Old Growth Habitat must be distinguished from Old Growth Timber	26
No-Action Alternative must set out Minimum Management Requirements	28
Management Indicator Species: Maintaining Viability not contingent on keeping Habitat at Current Level	29

DECISIONS PERTAINING TO LAND AND RESOURCE MANAGEMENT PLANS, Cont'd

Forest has Right to decide Area to be covered by Cumulative Effects Analysis 30

RPA Price Trends may be used in the LRMP 31

Apparent Failure to meet NFMA Restocking Certification Requirement 32

Timber Harvesting allowed in Grizzly Bear Habitat 33

No-Action not a Decision to lease or not to lease Oil or Gas Reserves 35

Final Decisions about Oil and Gas Leasing not made in LRMP 36

Certain Grazing Decisions on Individual Allotments not made in LRMP 37

Example of an Adequate Range of Alternative Wilderness Recommendations 38

Worst Case Analysis of unlikely Scenarios not required in FEIS 39

Forest-wide Mitigation Measures contained in Management Area Standards 41

Location and Extent of Roads and Closures not decided in LRMP 42

2. DECISIONS PERTAINING TO RECREATION 43 - 47

Optional Classification System for Reallocating Recreation Residence Fees 43

Walk-in Skiing provides semi-primitive Experience, avoids Commercialization 44

A Foot Trail is not an Improvement under the Small Tracts Act 45

Term Permits apply to Recreation Residences, not to Isolated Cabins 46

River Usage need not be limited where Fishery is not in Steep Decline 47

3. DECISIONS PERTAINING TO SPECIAL USES 48 - 52

Privileges granted by Special Use Permit are not absolute 48

A Golf Course may be a Permitted Use of National Forest Lands 49

Actual Amounts of Streamflow are critical for Hydropower Development Decisions 50

Special Use Permits that benefit Public have Preferential Treatment 51

High Hazard Risk Liability of $1 Million justified 52

4. DECISIONS PERTAINING TO TIMBER MANAGEMENT 54 - 61

Cumulative Effects Analysis of reasonably foreseeable Actions may be confined to Projects in the Current Planning Period 54

An impending Timber Sale is not a Below-cost Proposal if the Initial Entry shows a positive Present Net Value. Long-term Economic Analysis at Project Level is useful primarily for assessing the relative economic Efficiency of Alternatives 55

Implementing 2-Inch Scaling Rule will have negligible Effects 56

Authority to sign NEPA Documents for a Project and implement it go together 57

Failure to discuss Cumulative Effects under a separate Heading does not render an Environmental Assessment deficient 58

The Significance of proposed Actions is determined by: Multiprojects, Multisales, Roadless Areas, Sensitive Wildlife Habitats 59

NEPA Documents might be invalid because they are outdated 60

Reasonable Alternatives may go beyond Current Management Direction 61

5. DECISIONS PERTAINING TO ENGINEERING 62 - 67

Failure to extend Road Closures not a Violation of NEPA 62

Limits on Timber Hauling on N.F. Roads not a Change in Sale Contract 63

A Road may be built in a Roaded Area without a Wilderness Review 64

Harvest Restrictions and Road Closures mitigate Impact of Timber Sale 65

Non-System Roads must be revegetated within 10 Years 66

Interim Road Density Standard for Grizzly Bear Habitat is One Mile per Square Mile 67

INTRODUCTION

1. Study Plan Objectives

The study objectives set forth in the original study plan were:

-- Assure that the Chief's decisions on appeals are transformed into formal policies.

-- Develop criteria for determining whether a decision is limited to a particular appeal, or whether that decision applies to similar situations on other Forests".

-- Recommend mechanisms for transforming such decisions into policy and for disseminating such policies. Suggested mechanisms include the following:

Publishing in the Directive System;
Publishing in the Appeals Data Base;
Notifying the Regions by letter.

-- Recommend a procedural framework for accomplishing the above tasks.

-- Estimate the workload and recommend roles to accomplish future work.

2. When do Appeals Decisions have Policy Implications ?

For purposes of the study, the term policy was defined as **"a governing principle or set of principles intended to guide or determine the future actions of an individual or an organization".** Traditionally the Forest Service has codified policy through the Directive System which -- as was noted in the Preface -- is also the principal vehicle for disseminating policies throughout the agency and to the affected publics.

Statements in the Chief's appeal decisions have **policy implications if they substantially modify existing policy contained in the Directive System, or if they clarify or supplement existing policy.** The Chief is the final reviewing officer of appeals originally made by Regional Foresters and/or Forest Supervisors. In very exceptional cases the Secretary of Agriculture may, on his/her own initiative, review and pass on the Chief's appeal decision.

Our search for statements having policy implications was confined to a sample set of 40 appeal decisions made by the Chief. Copies of the letters containing these decisions were supplied to us by the Washington Office LMP, Timber Management, Recreation, Lands and Engineering staffs. The Forests or Regions to which the Chief's appeal decisions refer together with the number assigned to each appeal are listed in the Bibliography at the end of this report.

3. Approach and Selection Criteria used

The initial step in our approach can perhaps best be illustrated by analogy to the use of a coarse-meshed screen. Coarse-meshed screen is, in fact, quite an accurate characterization of the selection criteria described below. As we read through the Chief's appeal decisions, any statement that appeared to fit these criteria -- that might, in other words, have policy implications -- was underscored, marked in the margin for further scrutiny, and recorded on a separate sheet in the form of one or more keywords. These keywords were drawn from a list we put together for this purpose. On a rough estimate, more than a hundred "candidate" statements were screened out in this fashion.

Simultaneously with this preliminary screening process we scanned what we felt to be relevant sections of the CFR, the FSM and the Handbook, went back to the CEQ Regulations and generally studied materials dealing with policy-related matters, all in preparation for the next and most exacting step. It consisted in reexamining each "candidate" statement or segment of statements and matching them against relevant passages in the Directive System. Through this winnowing process the initial set of statements was reduced by at least two thirds.

By way of preamble to the subject of the criteria used, it has to be noted that most statements in the Chief's appeal decisions are simply re-affirmations of the positions taken up by Regional Foresters in their initial responses to appeals of decisions made by Forest Supervisors. Occasionally, however, the Chief introduces wording that suggests a significant departure from, or a substantial modification of, existing policy codified in the FSM. More frequently occuring are statements that clarify, expand or supplement existing policies or provisions. Almost all statements of the second type are specific in nature, and hence fit neither into the Manual which is conceived in terms of general principles, nor into the Handbooks which constitute the operational counterpart -- the "how to" -- of the Manual.

FINDINGS

1. Appeal Decision Statements identified in the Study

The final count of statements that met the above policy implications criteria and passed the finer screening process added up to less than fifty. The statements often appear in more than one appeal decision, and there are sometimes quite marked and significant variations in their wording. Some were found to have been further expanded in the course of subsequent litigation.

Relatively few of the policy related statements that we identified were such as to prompt the need for amendments to the FSM. Most were clarifications of, or additions to existing policy. Because they are usually tied to specific topics or situations, they do not, in our opinion, qualify for inclusion in the Manual. All the same, their very specificity makes it important to devise a suitable vehicle for disseminating them to all levels of the agency.

Our final selections are contained in APPENDIX B. Each statement or group of statements relating to a given policy issue is presented on a separate page under a caption summarizing the gist of the appeal decision.

2. Three key study findings

At least three study findings testify to the advisability of a continued review of appeal decisions for their policy implications.

First, although Court rulings are cited frequently and extensively in the chief's appeal decision letters, **we found in our sample only one citation from a previous decision letter in support of a new decision.** The reason for this that seems most likely to us is that changes or additions to existing policies originating in previous appeal decisions are not systematically captured, codified and consolidated, and hence not readily accessible even to the Chief's staff.

Secondly, there is evidence that appeal decision citations can have a telling effect in litigation. Some appellants-turned-plaintiffs are aware that previous appeal decision are not systematically captured and stored for ready retrieval, and have converted this defficiency to their advantage. As we discovered in our studies on litigation, they rely on a networking system that has quite some time ago begun to scour especially the Chief's appeal decisions for statements that can be used to attack or embarass the Forest Service. The OGC attorneys have even given us examples of the Courts having found against the agency when plaintiffs were able to show inconsistencies or outright conflicts between appeal decisions. A recent example is included in the list of references at the end of this report. (See Citizens for Env. Quality v. Lyng). There are also instances where the agency has prevailed, basing its case on the Chief's appeal decisions. On the issue of whether the allowable sale quantity is a mandatory value, to quote one case in point, the agency was able to demonstrate a consistent position by reference to several previous

appeal decisions. The allowable sales quantity issue is dealt with in detail in Appendix B. (See also Intermountain Forest Industry Association v. Lyng in the Reference section.)

Our third relevant finding is that, in the absence of unambiguous direction incorporated in the Directive System, **the field is prone to inadvertently misinterpret the intent of an appeal decision by the Chief.** For example, as evidenced by a written handout and a formal presentation at a meeting at which one of us was present, the staff of one region placed an unforeseen construction on the Chief's Panhandle and Flathead appeal decisions that specified what are the decisions made in a forest plan. The staff was evidently under the impression that additional decisions could be made in an LRMP, so long as their expected impacts were made plain in the ROD. This interpretation was quite plausible since it is nowhere stated in either of the above appeal decisions that only those specified AND NO OTHER DECISIONS are made in the LRMP.

3. Differences in Scope of Applicability of Appeal Decisions

One of the findings that came to light early in the study was that there is another distinguishing feature of decision statements that appear to have policy implications: their scope of applicability.

A decision statement that is broad in scope applies at the least to a large segment of the Service and/or covers a wide range of conditions, circumstances, species, etc. Conversely a decision statement that is narrow in scope applies in a limited context only.

4. Applicability Scope of most Appeal Decisions cannot be easily inferred

From the language and content of some appeal decisions it can be inferred whether the Chief intends them to have broad or narrow application.

For example, the Flathead N.F. Decision Letter (Appeal No. 1467/1513) contains a statement suggesting broad applicability:

> Page 8, item 3: "In light of the above discussion ... one might ask what is decided in an LRMP ? Generally, the Regional Forester's approval of an LRMP results in..." - and a list of 6 decision types follows.

At least three pieces of evidence favor this interpretation. For one, similar language appears in another appeal decision (Panhandle N.F., Appeal # 2130). Secondly, the Agency's top management as well as the OGC frequently refer to it or cite it. And lastly, the RODs for the LRMPs in Region 5 now contain words that conform to this appeal decision.

Conversely, in his decision on the Inyo NF Appeal (# 1956), the Chief conceded that a particular tract of FS-administered federal land could be used for a golf course on the grounds that the surrounding lands have been developed

and the natural character of the area had thereby been modified. FSM 2721.43, 2346,and 2709.11 which deal with the permissible uses of federal land, do not contain criteria for use for a golf course, and the Chief's justification for allowing the appeal lacks the hallmarks of a criterion. Rather, it was clearly fashioned to fit the specific facts of this case. From this it has to be deduced that the scope of applicability of the decision is meant to be narrow.

The intended scope of applicability of most appeal decisions is, however, not self-evident. So far as appellants are concerned, they will almost always see it in their interest to argue for a prior appeal decisions to be given a broad interpretation. Thus it would not be giving anything away to appellants if appeal decisions were to be explicitly designated as "broad" or "narrow" in their scope of applicability. Doing so, would have the benefit of removing some of the Forest Service deciding and reviewing officers' uncertainties.

By way of illustration we have attached at the end of each appeal decision included in APPENDIX B, in a paragraph called **DISPOSITION**, our own assessments of where the decision statement should go in the Directive System, as well as what we consider to be its scope of applicability.

5. Significance of Policy Implication is independent of Applicability Scope

We found that the policy implications of appeal decisions may be grouped into four categories according to the significance of the policy implication and according to its scope of applicability. These categories are illustrated by the following examples:

Example 1: Warrants a Change in FSM and is Narrowly Applicable

Decision: Actual Amounts of Streamflow are critical for Hydropower Development Decisions (Details on p.50)

Reasoning: In our opinion, this decision does more than clarify or supplement existing policy, and an amendment to the FSM is therefore warranted. Determining the minimum amounts of water flow needed to maintain fish habitat is fundamental to the question of balancing the feasibility of a hydro-project against the need to protect the environment. This appeal decision is narrowly applicable because the potential for hydropower developments is limited to relatively few locations. (Wasatch-Cache N.F. Appeal # 1972)

Example 2 : Warrants a Change in FSM and is Broadly Applicable

Decision: Choice of Silvicultural System in LRMP is not final (Details on p.20)

Reasoning: The planning regulations, CFR 219, set forth criteria for choosing a silvicultural system but do not state that the choice must be made in the LRMP. The fact that choices are made as part of the FORPLAN runs might suggest that the choice of silvicultural system made in the LRMP is indeed final. But any such choices are, in fact, merely provisional. The final choices are made

at the project level. In our opinion, this is a fundamental issue, and the clarification afforded by the appeal decision warrants a change in the FSM. Moreover, the decision is clearly applicable broadly throughout the Forest Service. (Flathead N.F. Appeal # 1467/1513)

Example 3 : Clarifies an Existing Policy and is Narrowly Applicable

Decision: NEPA Documents might be invalid because they are outdated
(Details on p.60)

Reasoning: Sometimes there is a delay between the completion of environmental documentation and the actual project execution. As evidenced by some recent court rulings, intervening events during the delay period can overtake the reasoning used in the environmental analysis and cause the document to be outdated. In our opinion this appeal decision does not warrant a change in the FSM, and is narrow in scope of applicability since long delays occur only in rare and unusual instances. (Tahoe N.F. Appeal # 1939)

Example 4 : Clarifies an Existing Policy and is Broadly Applicable

Decision: Special Use Permits that benefit the Public have Preferential Treatment (Details on p.51)

Reasoning: Forest officers have the discretion to approve applications for special uses that conform to the approved LRMP. This discretion is implicit in CFR 219, which does not, however, indicate whether public uses are to be given preference over private uses. In our opinion this appeal decision clarifies the existing policy on preferred uses, and since the appeal decision language does not identify any particular public benefit but instead speaks to the general public interest, this decision is broadly applicable to other National Forests. (Coronado N.F. Appeal # 2082)

6. Complexity of Forest Plan and Timber Management Appeals not diminishing

Most of the decisions we have reviewed were concerned with single issue appeals couched in relatively simple terms and relatively thinly documented, although we did not have a chance to review all the original documentation submitted as part of each appeal.

Appeals of Forest Plans and of Timber Management plans are a different matter altogether. The combined appeals of the Flathead LRMP (# 1467/1513) involved 200 documents totalling several thousand pages, and the Chief's Decision for that appeal totalled 80 pages. The Idaho Panhandle LRMP appeal (# 2130) was almost as complex. Recently, the Sequoia LRMP in Region 5 had 21 appeals, including 3 separate appeals from different parts of the State of California. Some appeals of project level decision, of which many more are expected once the Forest Plans have been approved, are comparable in complexity. The files

for the Cowee-Davis timber sale appeal, challenging the adequacy of the Environmental Assessment, filled a stack of boxes about 3 feet high. Likewise the Go-road case at the Six Rivers N.F. in Region 5 involved NFMA, NEPA, APA, Clean Water Act, Indian Rights, Freedom of Religion and other lesser issues.

7. Prerequisites for locating Policy-relevant Decisions

The search for appeal decisions that have policy implications turned out to be different from what was anticipated. At the outset it should have occurred to us, as it did not, that the decisions which became the object of the initial appeal, must have been based on the agency's standing policy. Consequently every decision or decision statement in the Chief's appeal decision letters were bound to appear to be policy-related. The problem was how to separate out decision statements that modified, clarified, expanded or supplemented existing policy rather than merely reiteraring it. And, as has been indicated in the Approach and Criteria section of the Introduction, the way we did it was to first apply a "coarse mesh" screen and then a "fine mesh" screen.

This would likely not be a problem for staff members engaged in drafting appeal decisions for the Chief now or in the future if they were also to be charged with putting an identifying tag on statements that change or add to standing policy. They must be presumed to know their Manual, and would thus be well aware of any significant departure from policy they had introduced into, or found in, the language of the draft.

However, anyone faced with the task of singling out statements with policy implications from past appeal decisions drafted by someone else -- especially if that someone else were no longer around -- will be up against the same difficulty we were. A good knowledge of the Manual, as well as of Planning regulations are one prerequisite for the task. Next, since most appeals are focused on issues having to do with the environment, a more than superficial grasp of NEPA, of the CEQ Regulations and of other environmental protection legislation, such as the Endangered Species Act, are necessary.

Other task requirements are less easy to be specify. We were tempted to lump them together under such terms as experience and intuition, but this would not be of much help. Beyond this, we found that lengthy discussions and supporting arguments quite often seem to mask policy relevant statements. Extracting the gist of a response to a point raised by appellants can be helpful. So can familiarity with the kind of language used by lawyers and attention to what at first sight appear to be quite slight changes in the FSM wording.

RECOMMENDATIONS

1. Complete and continue Scrutiny of Appeal Decisions for Policy-relevant Statements

Two recommendations follow from the main finding of the present study that statements which modify, clarify or expand existing Forest Service policy are not at all exceptional in the Chief's Appeal Decisions:

First, the search for such Statements which in this study was confined to a sample set of Appeal Decisions should be extended to preferably all past decisions thereby providing a base of reference for those who write future appeal decisions.

Secondly, the format used in this study for presenting the results of the search appears to be appropriate for putting Forest Service officers into the picture, and should be adopted.

2. Follow the Search Procedure and Criteria developed in this Study

The first step in the search procedure has been described in the Introduction as coarse-mesh screening. Its purpose is to pick out statements that appear to have policy implication without regard to whether identical or similar language is already contained in the Directive System. Prerequisite for this step as also for the final selection is a good knowledge of the Directive System, NFMA and of the CEQ Regulations that spell out NEPA in operational terms.

The criteria to be applied in making the final selections from the pool of initially picked statements are built into the following questions:

Does the wording of the statement suggest a significant departure from, or a substantial modification of, existing policy ?

Does the wording of the statement appear to clarify, expand or supplement existing policy ?

A Yes answer to the first question indicates that the wording of the statement should be evaluated for integration into, or substitution for, the existing wording in the Manual. A Yes answer to the second question again requires reference to the Manual. A No answer to either question disqualifies that statement from further consideration.

3. Determine the Scope of Applicability of Statements selected

As pointed out in the corresponding finding, the scope of applicability of most appeal decision statements cannot be readily inferred. After several attempts

at devising criteria for making this determination, we finally gave up on this task. We can, however, offer some guideposts and aids we found useful. One of these is the diagram below, intended to help determine the Significance/Applicability Scope combination best fits a given decision statement.

	Broadly Applicable:	**Narrowly Applicable:**
Warrants an Amendment of the FSM:	**yes/no ?**	**yes/no ?**
Clarifies or Supplements Existing Policy:	**yes/no ?**	**yes/no ?**

Another guidepost we found helpful is that statements which appear to warrant amendments of the Manual will generally tend to be broadly applicable, while clarifying etc. statements will tend to have narrow applicability. This, it bears repeating, is a guidepost and not a "rule" to be used indiscriminately and mechanically.

In particular, a determination based on this guidepost can be overridden by a more fundamental consideration expressed in the following question:

How broadly applicable did the Chief intend this decision statement to be ?

To arrive at answer may not be easy, and may require inquiries and consultation with staff members who helped draft the appeal decision in the first place, and possibly as well with OGC attorneys who would consider this question in its bearing on potential future litigation.

4. Proposed Channels for Disseminating Policy-related Appeal Decisions

The following proposals for disseminating appeal decisions that have policy implications have their starting point in the finding that there are two types of such decisions, or more precisely, decision statements:

-- those that appear to represent a significant departure from, or a substantial modification of, existing policy

-- those that appear to clarify, expand or supplement existing policy

With few exceptions, statements of the first kind will necessitate changes or revisions in the FSM or FSH. Because of the time-lag intervening between the completion of such changes and the publication in the "white pages", the usual practice of dissemination through the "pink pages" -- which are also part of the Directive System -- would clearly be the appropriate way to go.

Less well established channels offer themselves as possible ways of disseminating statements of the second kind that amplify rather than modify existing policy. One of these might be to circulate to all regions and forests, under a suitable cover letter, a list of informative captions summarizing the essence of the appeals issue to which the Chief was responding. Such a list (for the decisions analyzed in this study) is shown in the Table of Contents. Each caption would have attached to it identifying information such as the keywords we have used, or the number assigned to the Appeal, or the name of the National Forest where the appeal issue originated.

Anyone interested in finding out more would be able to do so by using this identifying information as a cross-reference to the relevant section of the Appeals Data Base which is currently under development.

The first circular letter, confined to the appeal decisions analyzed by us, would serve a dual purpose. It would give people in the field an opportunity to see what the sample analysis has yielded, and to react to it. And further, it would provide them with a format and with examples for writing about policy implications of locally reviewed appeal decisions. Other uses may emerge.

If the Chief's office finds that the circular letter containing informative captions and identifying information serves a useful purpose and decides to continue the analysis of appeal decisions, then we recommend that from time to time update letters be sent out to the field.

5. Assignment of Responsibility for initiating Changes in FS Manual

For appeal decisions that warrant a change in the FSM, the responsibility for initiating the change should be assigned to the reviewing officer. A proposed Interim Directive is enclosed in APPENDIX C.

6. Procedure for Handling Policy Statements not warranting Changes in FSM

For appeal decisions that clarify, expand or supplement existing policy, and therefore do not warrant a change in the FSM, the following supplemental reference material should be included in the appeals data base:

- An extended summary of the policy implications related to each issue
  covered by the appeal decision,

- Copies of background documents that are directly related to each
  issue, such as the Chief's memos and the Secretary's reviews.

- Cross references to pending or completed litigation that are
  relevant to each issue

REFERENCES

A. ADMINISTRATIVE APPEAL DECISIONS

Land Management Planning

Rio Grande NF, Appeal # 1184

Idaho Panhandle NF, Appeal # 2130

Flathead NF, Appeals # 1467 and 1513

Routt NF, Appeal # 1010

Routt NF, Unnumbered Appeal, 5/25/84

Custer NF, Appeal # 2042

Humbolt NF, Appeal # 1771

Superior NF, Appeal # 1628

Angeles NF, Appeal # 2257 (Responsive statement)

Shoshone NF, Appeal # 1552

San Juan NF, and Grand Mesa, Uncompahgre & Gunnison NF, Unnumbered Appeal, 7/31/85

Helena NF, Appeal # 1648

Helena NF, Appeal # 1649

Lewis and Clark NF, Appeal # 1650

Lewis and Clark NF, Appeal # 1666

Medicine Bow NF, Appeal # 1442

Toyabe NF, Appeals # 1694 and 1696

Kisatchie NF, Appeals # 1378 and 1379

Gila NF, Appeal # 1882

Clearwater NF, Appeal # 2192

Timber Management

Beaverhead NF, Appeal # 2467

Klamath NF, Appeal # 2026 (USDA review of 10/26/88))

Region 5, Appeal # 2271

Klamath NF, Appeal # 2468

Region 5, Appeal # 2303

Region 5, Appeal # 1939

Siuslaw NF, Appeal # 1836

Shawnee NF, Appeal # 3056

Recreation

Inyo NF, Appeal # 1956

Flathead NF, Appeals # 1785 and 1787

Shawnee NF, Appeal # 2233

Targhee NF, Appeal # 1962

White Mountain NF, Appeal # 2086

Leisz appeal, Unnumbered, 4/18/89

Lands

Deschutes NF, Appeal # 2013

Six Rivers NF, Appeal # 2381

Klamath NF, Appeal # 1392

Eldorado NF Fee Appeal, Unnumbered

Wasatch-Cache NF, Appeal # 1972

Coronado NF, Appeal # 2082

B. JUDICIAL REVIEWS

City of Tenakee Springs v. Block, 778 F.2d 1402 (9th Cir. 1985)
(Non-wilderness allocation not an irreversible commitment to develop)

Intermountain Forest Industries Assoc. v. Lyng, C88-009,0010 (D. Wyo., 6/18/88)
(Harvest targets are maximum amounts, not mandatory amounts)

Sierra Club v. U.S. Forest Service, 843 F. 2d 1190 (9th Cir. 1988)

Citizens for Environ. Quality et al. v. Lyng, 87-F-1714 (D. Colo., 8/24/89)
(Secretary's decision on GMUG appeal is applicable to Rio Grande appeal)

California v. Bergland, 483 F.Supp.465 (E.D.Cal.1980), aff'd in part, rev'd in part sub nom. California v. Block, 690 F.2d 753 (9th Cir. 1982)
(RARE II. decision)

C. OTHER REFERENCES

Digest of USDA Forest Service Administrative Appeal Decisions related to Land and Resource Management Plans, June 6, 1988, prepared by the USDA Office of General Counsel, Natural Resources Division.

"Decisions in Forest Plans", unpublished paper, Fred Norbury, LMP Staff, 1988.

"Forest Plan Implementation: Gateway to Compliance with NFMA, NEPA and other Federal Environmental Laws", Michael J. Gippert and Vincent L. DeWitte, Natural Resources Division, Office of General Counsel, USDA, March 1989.

APPENDIX A: SYNOPSES OF PRIOR REPORTS IN THIS SERIES

This report is one of a series of reports on appeals and litigation that began in 1986. Our prior work focused mainly on litigation, in contrast to the present report where the emphasis is on appeals. The main reason for the initial emphasis on litigation was that when the Service suffers a loss in the Courts and seeks Congressional intervention, the Congress almost invariably places constraints on our freedom to act or operate at our discretion. Legal scholars generally agree that enactment of the National Forest Management Act was a direct consequence of the Government losing in the Monongahela case. Again, when the RARE II case was lost, Congress bypassed the Forest Service by a series of state-by-state Wilderness bills.

The **first** report, entitled **"Appeals and Litigation of Forest Service Environmental Decisions"**, published in October 1986 and revised in February 1987, presented findings and recommendations derived from a study of some 60-odd Federal Court cases involving National Forests, and included detailed analyses of six precedent-setting cases.

Examination of the differences in language usage and emphasis between the CEQ Regulations and Forest Service publications, another task we undertook, suggested that a closer look at NEPA documentation requirements would be useful. This comparison appears in the **second and third** reports.

The **second** report, entitled **"Differences in Interpretation of the NEPA Requirements for Environmental Impact Statements: Forest Service vs. CEQ Regulations"**, April 1987, dealt with the question: "When is an Environmental Impact Statement required?"

The **third** report, entitled **"An Alternative Approach to Categorical Exclusions from NEPA Documentation"**, September 1987, focused on the question of when and how a proposed action can be legitimately "categorically excluded" from NEPA documentation.

The **fourth** report of the series has already been widely distributed by the Chief's office. Entitled **"Questions and Answers about the Equal Access to Justice Act"**, July 1987, it discussed the provisions of the Act for the reimbursement of legal expenses to challengers when they have prevailed against a Federal agency. We foresaw a future in which administrative appeals would include, in addition to substantive environmental challenges, lengthy legalistic maneuvers aimed at justifying fee reimbursement.

In the **fifth** report, completed in October 1987, we put forward a proposal for assuring that the risks associated with alternative ways of handling particular disputes are weighed before the disputes were permitted to escalate. At the core of the proposal was the institution of organizational "mechanisms" called Strategy Panels which would consider disputes from a multi-regional viewpoint.

Their chief purpose was to prevent individual line officers who are liable to lack an overall perspective from inadvertently jeopardizing other Regions or Forests.

The material in these reports was the subject of a briefing of Chief and Staff given by one of us (Kirby). In expressing his support, the Deputy Chief who commissioned the study said he was "surprised and pleased that your findings are woven into a convincing fabric, and that your recommendations follow directly and closely from the study findings!"

Subsequent to that briefing, several changes have been made in the way disputes over environmental decisions are handled. In line with a recommendation in our first report, the administrative appeal regulation was revised to separate the NEPA-based challenges from challenges of decisions on the occupancy and use of Forest Service administered federal lands. Also following a recommendation in our first report, the development of an appeals data base accessible Service-wide is now underway.

The authors take some pride in whatever part their recommendations may have had in the adoption of changes they believe to be to the agency's benefit.

APPENDIX B: ANALYSES OF APPEAL DECISIONS

1. DECISIONS PERTAINING TO LAND AND RESOURCE MANAGEMENT PLANNING

SOME DECISIONS ARE MADE IN THE LRMP AND SOME ARE DEFERRED TO THE PROJECT LEVEL STAGE

Background: We are indebted to Dennis Teeguarden, Professor of Forestry in the Department of Forestry and Resource Management at the University of California, Berkeley, and Member of the NFMA Committee of Scientists, for allowing us to quote from his analyses of the more than 30 provisions governing forest planning. Of these provisions he construed the following thirteen as **decision categories:**

- -- Provide for Multiple Use and Sustained Timber Yield
- -- Determine Forest Management Systems and harvesting levels
- -- Provide planned timber sale program
- -- Determine probable timber harvest methods for each unit (sub-area)
- -- Identify lands suitable for management. Also **NOT** suitable
- -- Provide for diversity of plants and animals
- -- Preserve diversity of existing tree species
- -- Provide monitoring Plan
- -- Establish standards and guidelines
- -- Show that clearcutting is optimal
- -- Establish maximum size of openings
- -- Establish length of rotation
- -- Determine the steps to eliminate backlogs by A.D. 2000

It is important to note that the regulations (CFR 219) do not always specify which of the decisions are to be made in the LRMP and which subsequently at the project level. However, in several appeal decisions the Chief has provided direction on this point which is clearly meant to apply to all LRMP's (even though the language is not identical in all these appeal decisions).

The most comprehensive statements about what decisions are made in the LRMP can be found in more recent decision letters, specifically those relating to the Routt N.F., the Idaho Panhandle N.F. and the Flathead N.F. appeals. A more inclusive list of the appeal decisions addressing this issue is given at the end of this section.

Issue raised in Appeals:

In almost every LRMP appeal we have read, appellants refer to decisions made in a forest plan that they allege are inadequately or not at all supported by site-specific analyses required by NFMA, NEPA and other relevant legislation.

Policy Implications of Chief's Decision:

The following passages from the Idaho Panhandle N.F. appeal decision exemplify the Chief's position on this issue:

"The decisions of the responsible Regional Forester in approving a Forest Plan may generally be categorized as:

1. Establishment of forest-wide multiple-use goals and objectives [36 CFR 219.11(b)];

2. Establishment of forest-wide management requirements (standards and guidelines) to fulfill requirements of NFMA applying to future activities (resource integration requirements of 36 CFR 219.13 to 219.26,and requirements of 36 CFR 219.27);

3. Establishment of management area direction (management area prescriptions) applying to future management activities in that management area [36 CFR 219.11(c)];

4. Establishment of allowable timber sale quantity and designation of suitable timber land (36 CFR 219.16 and 219.14);

5. Nonwilderness multiple-use allocations for those roadless areas that were reviewed under 36 CFR 219.17 and not recommended for wilderness designation;

6. Monitoring and evaluation requirements [36 CFR 219.11(d)]; and

7. In some instances, project and activity level decisions if specifically identified in the Record of Decision, Forest Plan, and adequately disclosed for NEPA purposes in the Forest Plan EIS."

Other National Forests whose LRMP's have been appealed on the decisions issue: Custer (Appeal 2042), Flathead (Appeal 1467/1513), Helena (Appeal 1649), Humbolt (Appeal 1771), Routt (Appeal 1010), Shoshone (Appeal 1552); Routt LRMP Appeal of RMOGA, May 25, 1984; Pike and San Isabel LRMP Appeal of Maas (Appeal 1130); Kisatchie LRMP Appeal of Wiener (Appeal 1378 and 1379); Panhandle LRMP Appeal of Idaho Conservation League (Appeal 2130).

UPDATE: The Forest Service's two step appeal decision process is currently under judicial challenge in Idaho Conservation League v. Robertson (Panhandle LRMP appeal decision) and Resources Limited, Inc. v. Robertson (Flathead LRMP appeal decisions).

Selected Keywords: Decisions, programmatic, mandatory, Management Direction, Management Requirements, Goals and Objectives, Standards and Guidelines, ASQ,Suitable land, Roadless Areas, Monitoring and Evaluation.

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

ALLOWABLE SALE QUANTITY IS NOT A MANDATORY VALUE

Backgound:

The planning regulations define Allowable Sale Quantity in the context of forest wide planning as the average annual rate of timber that MAY be sold from SUITABLE LAND during the plan period. However, nowhere in the regulations is it made clear whether the ASQ is to be interpreted as a mandatory limit (either upper or lower), as a discretionary "target" which management should strive to accomplish, or in some other way.

Elsewhere (219.16) the regulations state that the sale schedule will provide the ASQ, and that the schedule will be formulated so as to meet the requirement of sustained yield and non-declining flow by decades, with departures permitted to meet multiple use objectives. But the question whether it is a limit quantity, a target to be aimed at, or some other quantity is again left unanswered.

Issue raised in Appeal:

In the absence of a definition, appellants have understandably interpreted the ASQ in a way favoring their interests, and have attacked other interpretations as placing it either too high or too low.

Policy Implications of Chief's Decision:

The Chief's decisions on the appeals below have **unambiguously defined the ASQ as an "upper limit"** rather than a mandatory level of production. Although the language of the decisions is not always identical, the meaning is the same, as shown in the following passages:

"It is important to note that **allowable sale quantities in the plan are upper limits** for the plan period, not actual proposals for timber sale offerings. The annual timber sale offerings depend on budget appropriations and market conditions."

San Juan and GMUG N.F., 9/10/84

"It should be pointed out that the **allowable sale quantity is the maximum level of timber that can be sold** under the plan. Actual sale levels will depend upon a number of factors, including timber sale funding levels. The allowable sale quantity corresponds to what in existing timber management plans is referred to as the allowable harvest."

San Juan and GMUG N.F., 7/31/85

"The **allowable sale quantity in the LRMP is the upper limit on industrial wood sold** from suitable Forest land for the 10 years of the planning period, not an actual proposal for timber sale offerings. The annual timber sale offerings depend on budget appropriations, multiple-use objectives, and market conditions. The decision to offer a certain timber sale will be based on a determination in the sale-specific analysis that such a sale will provide positive net public benefits." Routt N.F. (Appeal 1010)

"The Timber Management Plan provides direction for the management of the timber resource on the Forest. It gives only an **estimate of the potential yield** based on the management direction. This estimate **is accepted as the maximum timber yield** over the plan period based on the existing stands of timber, the productivity of the land, and the management constraints. The estimate is not a guarantee of the volume of timber that will be offered each year. The annual level of timber sales is controlled mostly by the program planning and budget process and congressional appropriations."

Klamath N.F.Timber Sale Program (Appeal 2026), 12/17/87

Other appeal decisions we have found to contain similar definitions of ASQ are Medicine Bow (Appeal 1435) and Lewis & Clark (Appeal 1666).

UPDATE: In a court case brought by the Intermountain Forest Industries Council and Mountain States Legal Foundation, the plaintiffs asked the District Court in Wyoming to order the Bridger-Teton NF to make available for harvest specific quantities of green timber, alleging that the Forest must provide that amount under the 1979 Timber Management Plan and under the draft LRMP. In an opinion dated April 18, 1988, the Court concurred with the Forest Service's dissent, quoting the Chief's decision on an appeal of the Klamath NF Timber Management Plan that sale targets are not mandatory, and indicating that the Chief's interpretation was entitled to deference.

Subsequently, the Secretary decided to review the above mentioned appeal of the Klamath Timber Management PLan. In October 1988, the USDA made public the Secretary's review of the Chief's decision of that appeal. Although the review document avoids the term "mandatory" in characterizing the force of Timber Management Plans, the strength of the LRMP goals and objectives (explicitly including ASQ) is described in such terms as **pledge, obligation, covenant, and commitment.** This leaves no doubt as to the Secretary's intent.

Early in 1989, the Chief's office followed up with a letter (signed by Deputy Chief Overbay) stating that there is a **"commitment"** to the public to work toward meeting the goals and objectives of an LRMP. He further indicated that either the plans must be followed or amended. The letter also defines how LRMP accomplishments are to be measured: as the sum total of accomplishments on site-specific projects. The meaning of the term commitment is clarified in several passages imposing upon the FS the obligation to:

"...work toward meeting the goals and objectives";
"continualy strive toward the attainment of the goals and objectives";
"meet goals and objectives if at all possible".

Selected Keywords: Allowable Sale Quantity, ASQ, Allowable cut, Sustained yield, Non-declining flow, Harvest Schedule

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

CHOICE OF SILVICULTURAL MANAGEMENT SYSTEM IN LRMP IS NOT FINAL

Background:

Even though an LRMP may suggest that a silvicultural system has been selected, the regulations do not designate this selection as a decision that has to be made in the LRMP. Making a choice of a system is necessary for planning purposes, for otherwise it would not be possible to compute the ASQ or evaluate the effects of different alternatives. More specifically, a silvicultural system must be selected for every FORPLAN run as a prerequisite to computing a sale schedule -- the choice determines the yield, cost and revenue to be used in the computations. Moreover, the choice shown in the LRMP is subject to change at the project planning level where further alternatives are going to be explored and refinements developed.

As for the regulations at CFR 219, they are explicit in setting set forth the criteria for choosing a system so as to protect the environment. Among these criteria are limits on restocking within 5 years after harvesting, restrictions on even-age management, halting intensified management practices under certain conditions, limits on the use of timber harvesting as a pest management treatment, limits on the size and shape of openings, cutting limits in riparian areas, etc. They also detail practices that are premitted (e.g., salvage and sanitation sales, and treatments such as thinning) and circumscribe others.

Issue raised in Appeal:

In their appeal of the LRMP, the appellants express the belief that the Forest has not demonstrated clearcutting to be the optimum silvicultural method on the Forest.

Policy Implications of Chief's Decision:

The silvicultural systems chosen in the LRMP do not constitute a decision. **Site-specific determinations**, based on site-specific information, **will be made at the project level**; these are the **final determinations** of what silvicultural prescriptions will be applied on-the-ground and **will be subject to further NEPA** analysis, and thus they are decisions **subject to administrative appeal.**

Flathead N.F. (Appeal 1467/1513)

Selected Keywords: Silvicultural systems, Even-age management

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

NON-WILDERNESS ALLOCATIONS DO NOT MANDATE DEVELOPMENT OF ROADLESS AREAS

Background:

Allocations of land to the Non-wilderness category does not mandate development of such lands, but merely permit such lands to be considered for development. Comparison of the Tenakee Springs litigation with RARE II litigation shows that the RARE II case no longer applies to this issue.

Issue raised in Appeal:

The appellants contend that "as a result of the failure to identify the major federal actions and the critical issues to be examined, the Idaho Panhandle National Forests RARE II Restudy contains many legal errors." According to the appellants, "the major federal action requiring preparation of an EIS is the Forest Service's release of roadless areas from roadless management to other management categories which **may preclude those areas from consideration as wilderness in the future."**

Policy Implications of Chief's Decision:

The assignment of management prescriptions is not an irretrievable or irreversible commitment of resources. **The assignment of a nonwilderness multiple-use management prescription to a roadless area does not necessarily mean that the area will be developed during the next 15 years.** Further administrative procedures will be performed prior to a decision to conduct activities that will affect the roadless characteristics or wilderness features of the area.

Idaho Panhandle N.F.(Appeal 2130)

Issue raised in Appeal:

Appellants contend that the FEIS lacks sufficient site-specific information regarding the following topics: Roads, Fisheries and water quality, Diversity and old growth, Timber economics, Wildlife (grizzly bear, big game, eagle), Range, Visual resources, Wilderness. **The general thrust of these contentions is that the FEIS must contain site-specific information on each of these resources** within the approximately 2.3 million acre planning area.

Policy Implications of Chief's Decision:

In California v. Block (1983), the Ninth Circuit Court of Appeals found that the point in time when (this) site-specific analysis is to occur is "when, as a practical matter, the agency proposes to make an 'irreversible and irretrievable commitment of the availability of resources' to a project at a particular site."

The view that the multiple use management prescriptions in the LRMP are not an irreversible and irretrievable commitment of resources has been confirmed by

the Ninth Circuit in City of Tenakee Springs v. Block, 778 F.2d 1402 (1986). The Court found that assignment of specific multiple use management prescriptions in the Tongass National Forest Land and Resource Management Plan were permissive rather than mandatory, because the "no-action" alternative would continue to exist and must be considered before undertaking site-specific proposals. Tenakee Springs, 778 F.2d 1406. The concurring opinion also agreed that the assignment of a timber oriented management prescription was not a final commitment of the resource because **under NEPA the agency was required to consider not only how to develop the area, but also whether to develop the area in the form of the no-action alternative.** Tenakee Springs, 778 F.2d 1410.

Flathead N.F.(Appeal 1467/1513)

Selected Keywords: No-action alternative, irreversible commitment, irretrievable commitment, roads, fisheries and water quality, diversity and old growth, timber economics, wildlife (grizzly bear, big game, eagle), Range, Visual resources, wilderness.

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

ANALYSIS OF ISSUES RELATED TO MAINTAINING SPECIES DIVERSITY

Backgound:

The CFR 219.27 management requirements for diversity are defined by means of such objectives as preserving and enhancing diversity of plant and animal communities, so that the diversity of these communities is at least a great as...in a natural forest. Planned type conversion is to be justified by an analysis of diversity-related issues. The intent of NFMA for this analysis is met by a detailed discussion of these issues. No specific targets or estimates of the percentages of acreage involved are necessary.

Issue raised in Appeal:

The appellants contend that "the regulations basically require that LRMP prescriptions maintain diversity [SAO, p. 16 (emphasis in original)]. This statement suggests that the regulations require that each LRMP ensure the maintenance of the exact "distribution and abundance of different plant and animal communities and species" (36 CFR 219.3) existing at the beginning of the planning period.

Policy Implications of Chief's Decision:

Contrary to the appellants' contention, the statute and the diversity provisions of the **regulations require only that (1) the Forest Service consider diversity during the planning process,** and (2) LRMPs provide for diversity "consistent with the overall multiple use objectives of the planning area" (36 CFR 219.26). Management prescriptions are required to "preserve" the diversity of plant and animal communities "where appropriate and to the extent practicable" within the overall multiple use objectives of the LRMP (Id.). There is no requirement in the statute or the diversity provisions of the regulations that a LRMP provide any specified level of abundance or distribution of particular plant or animal communities.

These requirements are procedural in nature. Information is to be collected, diversity is to be evaluated and considered, prescriptions are to provide for diversity where appropriate, and **reductions in diversity--including type conversions--are to be justified in terms of overall multiple use objectives.**

Flathead N.F.(Appeal 1467/1513)

Issue raised in Appeal:

Appellants contend that the FEIS inadequately considered plant diversity and long-term changes in wildlife diversity when evaluating roadless areas.

Policy Implications of Chief's Decision:

The term "diversity" is defined in 36 CFR 219.3 as "the distribution and abundance of different plant and animal communities and species within the area covered by a land and resource management plan." From this definition, **it is clear that the discussion of diversity is to be of a comparative nature** and is in reference to the diversity of the planning area (Helena National Forest) as a whole.

The procedures used considered diversity in the context of the entire Forest as well as for individual roadless areas. **Discussions of diversity can be found in the FEIS,** pages .. etc. A description of vegetative communities and wildlife groups is found on pages .. etc.

The Helena LRMP also contains **specific discussions of diversity in individual roadless areas.** While these **discussions** are not listed under the title "diversity," the **discussion** of the effects of variable alternative management prescriptions on local vegetative and animal communities is the kind of analysis anticipated by 36 CFR 219.17(b)(2)(v).

The Regional Forester **complied with requirements of the NFMA planning regulations to recognize and consider the diversity** of natural plant and animal communities of the Helena National Forest in his evaluation of the wilderness potential of roadless areas.

Helena N.F.(Appeal 1649)

Issue raised in Appeal:

Although appelants did not specifically raise the issue of diversity, it may be considered as part and parcel of their general contention that the FEIS violates NEPA because it lacks sufficient site specific information about the effects of the Forest Plan decisions in roadless areas assigned to a variety of nonwilderness multiple-use management prescriptions.

The planning regulations for roadless areas (36 CFR 219.17) lay down the requirement for the evaluation of the effects of Forest Plan decisions on five aspects of roadless areas. Among them are the anticipated long-term changes in plant and animal species diversity, including the diversity of natural plant and animal communities of the forest planning area and the effects of such changes on the values for which wilderness areas were created.

Policy Implications of Chief's Decision:

Appendix C of the DEIS and the FEIS [also] contains **discussions of diversity** in individual roadless areas. Appendix C describes the general plant communities and key wildlife species present in each area. In addition, the effects of variable alternative management prescriptions on local vegetative and animal communities **is discussed** for each area. While these discussion are not presented under the title "diversity," the Appendix C information, in conjunction with the **discussion of diversity** in the main chapters of the DEIS and FEIS, **is the kind of analysis anticipated by the planning regulations.**

Idaho Panhandle N.F.(Appeal 2130)

Selected Keywords: plant diversity, animal diversity.

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

OLD GROWTH HABITAT MUST BE DISTINGUISHED FROM OLD GROWTH TIMBER

Background:

Even many Forest Service managers have difficulties trying to explain to outsiders how exactly old growth habitat differs from old growth timber. Failure to get the distinction across is liable to foster the view that in order to provide for adequate old growth habitat, restrictions should be placed on the harvest of old growth timber, and if necessary, no harvesting should be done at all.

Issue raised in Appeal:

The appellants contended that "the Plan clearly does not provide sufficient old growth to maintain diversity, in violation of NFMA 6(g)(3)(B) and regulations pursuant thereto". The appellants offered several arguments to support this contention. Their requests for relief would have resulted in restrictions being placed on the harvest of old growth timber additional to the restrictions already included in the LRMP.

Policy Implications of Chief's Decision:

One source of confusion throughout the planning and appeal records is the difference between old growth timber and old growth habitat. Old growth timber is defined in the LRMP as equivalent to overmature timber. In turn, overmature timber is defined in the LRMP as:

> **Individual trees or stands of trees that in general are past their maximum rate in terms of** the physiological process expressed as **height, diameter, and volume growth.**

In contrast, old growth habitat is defined in the LRMP as:

> **A community of forest vegetation which has reached a late stage of plant succession characterized by a diverse stand structure and composition along with a significant showing of decadence.** The stand structure will have multistoried crown heights and variable crown densities. There is a variety of tree sizes and ages ranging from small groups of seedlings and saplings to trees of large diameters exhibiting a wide range of defect and breakage both live and dead, standing and down. The time it takes for a forest stand to develop into old growth condition depends on many local variables such as forest type, habitat type, and climate. Natural chance events involving forces of nature such as weather, insect, disease, fire, and the actions of man also affect the rate of development of old growth stand condition.

The two concepts -- old growth timber and old growth habitat -- **are related, but they are not the same.** It is to be generally expected that old growth habitat will be found within the area that is classified as old growth timber.

However, not all of the area that is classified as old growth timber will have the structural characteristics that will qualify it as old growth habitat.

Flathead N.F.(Appeal 1467/1513)

Selected Keywords: old growth timber, old growth habitat.

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

NO-ACTION ALTERNATIVE MUST SET OUT MINIMUM MANAGEMENT REQUIREMENTS

Background:

What is meant by a No-action alternative has a bearing on any action under NEPA, including projects, LRMP and Regional Guides. For projects, it is generally understood that no-action means the absence of a project. But this definition does not apply to programmatic actions when not preparing a program may not be permissible. Therefore, a No action alternative for a programmatic action is the program as it stands, not the absence of any program.

Issue raised in Appeal:

The issue is whether miniminum management requirements are appropriately part of a No-action alternative.

Policy Implications of Chief's Decision:

Although we have been unable to locate a specific statement of this requirement in CFR 219, the appeal decision insists that "There is no question that the regulations require use of MMRs in developing the no-action alternative."

PNW Region (Appeal 1588)

Selected Keywords: MMR, minimum management reguirements, no-action alternative

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

MANAGEMENT INDICATOR SPECIES: MAINTAINING VIABILITY NOT CONTINGENT ON KEEPING HABITAT AT CURRENT LEVEL

Background:

The concept of "management indicator species" (MIS) does not appear in NFMA but in the planning regulations. The purpose of identifying management indicator species is to estimate the effects of each (planning) alternative on fish and wildlife. A MIS represents a broader group of species which will have similar responses to specific management activities. Different MIS identified for forest planning often have different habitat requirements. A decline in MIS would be unacceptable if such a decline threatened the viability of a species.

Issue raised in Appeal:

The appellants argue that the LRMP fails to maintain and improve habitat for management indicator species and fails to maintain viable populations as required by 36 CFR 219.19(a) and 219.27(a)(6), [since] **the LRMP will not maintain habitat for [three named MIS's] at current levels.**

Policy Implications of Chief's Decision:

The regulations (36 CFR 219.19) establish specific procedural requirements for planning for management indicator species. These include:

1. Select vertebrate and/or invertebrate species as management indicator species and state the reasons for their selection.

2. Evaluate planning alternatives in terms of both amount and quality of habitat and of animal population trends of the management indicator species.

3. Estimate effects of changes in vegetation type, timber age classes, community composition, rotation age, and suitability of habitat in relation to management indicator species and their mobility limitations.

4. Establish objectives in each alternative to maintain and improve well distributed habitat for at least a minimum number of reproductive individuals so that they can interact to insure that viable populations of management indicator species will be maintained.

There is no language in the regulations indicating populations of indicator species must be maintained at current levels. 36 CFR 219.19 requires only that fish and wildlife habitat shall be managed to maintain viable populations. A viable population, as defined by 36 CFR 219.19, is ". . .one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area."

Flathead (Appeal 1467/1513)

Selected Keywords: indicator species, MIS, viable populations, LRMP

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

FOREST HAS RIGHT TO DECIDE AREA TO BE COVERED BY CUMULATIVE EFFECTS ANALYSIS

Background:

Although NEPA specifically requires that an EIS must include analyses of cumulative effects, the courts have placed the decision on the scope of the EIS -- including the extent of the territory to be covered by analyses of cumulative effects -- entirely within the discretion of government agencies.

Issue raised in Appeal:

The appellants contend that the FEIS inadequately considers cumulative effects, particularly with regard to grizzly bear and fish. Appellants claim that in order to "properly consider cumulative effects, the Forest should consider effects on the Flathead Basin as a whole," including other federal, state, and private lands.

Policy Implications of Chief's Decision:

The analysis required of an EIS is dependent on the nature and scope of the decision being considered. In discussing the topic of cumulative effects, the Kleppe decision (427 U.S.) states inter alia that:

> . . . determination of the extent and effect of these factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.
>
> Even if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements.
>
> In sum, [Sierra Club's] contention as to the relationships between all proposed coal-related projects in the Northern Great Plains region does not require that petitioners prepare one comprehensive impact statement covering all before proceeding to approve specific pending applications.
>
> Flathead (Appeal 1467/1513)

Selected Keywords: scope, EIS, Grizzly Bear, fish, cumulative effects,

Recommended Disposition: Clarification only, amendment in FSM not warranted, broadly applicable.

RPA PRICE TRENDS MAY BE USED IN THE LRMP

Background:

Some Forests used price trends for timber from the 1980 RPA Program which was considered to be the best available data at the time the bulk of the planning analysis was done. Before the LRMP was completed, new price trends were developed for the 1985 RPA Program.

Issue raised in Appeal:

The appellants contended that the use of high price trends distorted the FORPLAN model and caused planners to select timber harvest levels that were not cost efficient. The appellants ask that the RPA price trends be dropped entirely.

Policy Implications of Chief's Decision:

The Forest used price trends for timber from the 1980 RPA Program. Before the LRMP was completed, new price trends were developed for the 1985 RPA Program. These trends were lower than those that had been developed for the earlier RPA Program in the northern Rocky Mountain region. Although the analysis showed that the present net value of the PNV Benchmark was less with the 1985 price trends, this would be expected with lower timber values.

The appellants ask that the RPA price trends be dropped entirely [but] to drop the RPA price trends is the same as using a different trend, one that shows constant values over time. The appellants provide no evidence that this projection of future timber prices is more accurate, more reliable, or more reasonable than the projections done for the RPA program.

Flathead (Appeal 1467/1513)

Selected Keywords: RPA price trend, timber values.

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

APPARENT FAILURE TO MEET NFMA RESTOCKING CERTIFICATION REQUIREMENT

Background:

NFMA and the regulations contain the requirement that before a timber stand can be harvested, a research and experience based professional judgment must be made that the site of the harvest can be restocked within five years. The status of a stand that has been restocked is commonly confirmed through a formal certification, but this is not a requirement of NFMA or the regulations.

Issue raised in Appeal:

The appellants assert that 53% of the harvested stands on slopes greater than 60% did not achieve restocking within five years, basing this assertion on Forest Service records of stand certification.

Policy Implications of Chief's Decision:

"The appellants have erroneously assumed that a cut-over unit must be formally certified as restocked before it can be considered adequately restocked under NFMA and the regulations. Certification is essentially an administrative function which removes stands from nonstocked status in the Forest Service records. A lack of certification does not mean a stand does not meet NFMA requirements [for being restockable within five years].

Flathead (Appeal 1467/1513)

Selected Keywords: restocking, certification, nonstocked, land suitability.

Recommended Disposition: Clarification only, amendment in FSM not warranted, broadly applicable.

TIMBER HARVESTING ALLOWED IN GRIZZLY BEAR HABITAT

Background:

The Endangered Species Act forbids the "taking" of "endangered" species only. Although the Grizzly Bear is officially listed as a "threatened" rather than an "endangered" species, the Fish and Wildlife Service has issued regulations specifically prohibiting the "taking" of Grizzly Bears in the continental U.S. south of Canada. The term "taking" can be interpreted -- and has been interpreted by appellants -- as covering any resource management activity that modifies (changes, disturbs) a species' habitat.

Issue raised in Appeal:

The appellants made the allegation that the Forest LRMP commits a "taking" through timber harvesting in so-called MS1 (Management Situation 1) Grizzly bear habitat, and through habitat modification due to clearcutting, the latter constituting harassment of the animal. (For MS1 management direction see footnote.)

Policy Implications of Chief's Decision:

The Interagency Grizzly Bear Guidelines include specific management measures which were developed with bear researchers and wildlife units of the various state and federal agencies involved, including the Fish and Wildlife Service. **The IGBG do not disallow timber harvesting** or other surface disturbing resource management activities in MS1 grizzly bear habitat (IGBG, pp. 6-20). In fact, **the IGBG expressly recognize that timber management may occur** (IGBG, pp.7-12).

The IGBG provide extensive guidance for management activities in MS1 grizzly bear habitat. The IGBG also establish procedures for consultation when necessary. **When developing specific management proposals to take place on MS1 grizzly bear habitat, there will be an opportunity for public involvement. There will also be an opportunity to request administrative review through the administrative appeals process once a decision has been made.**

The LRMP does not commit the Forest to harvesting in any particular area or decide which harvest system is to be used for any particular project. Thus, there has not been a final irretrievable or irreversible commitment to conduct any clearcutting. The LRMP does establish standards and guidelines with reference to harvesting systems. **But it is the project level decision which determines the how, where, when, and whether to conduct on-the-ground activities.**

Flathead (Appeal 1467/1513)

Management direction for MS1: - Grizzly habitat maintenance and improvement and grizzly-human conflict minimization will receive the highest management priority. Management decisions will favor the needs of the grizzly bear when grizzly habitat and other land use values compete. Land uses which affect grizzlies and/or their habitat will be made compatible with grizzly needs or

such uses will be disallowed or eliminated. Grizzly-human conflicts will be resolved in favor of grizzlies unless the bear involved is determined to be a nuisance. Nuisance bears may be controlled through either relocation or removal but only if such control would result in a more natural free-ranging grizzly population and all reasonable measures have been taken to protect the bear and/or its habitat (including area closures and/or activity curtailments).

Selected Keywords: taking, Grizzly Bear, harvesting, land uses.

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

NO-ACTION IS NOT A DECISION TO LEASE OR NOT TO LEASE OIL OR GAS RESERVES

Background:

The Shoshone appeal decision clarifies the term No-action to mean current direction in the context of an LRMP. Although the policy clarification is made in relation to an appeal centering on oil and gas reserve leases on lands administered by the Forest Service, equating current management direction with the No-action alternative required by NEPA, it is precedent-setting, and as such likely to be invoked in future appeal decisions and in litigation.

Issue raised in Appeal:

Appelants contended that the MMRs [Minimum Management Requirements] built into the prescriptions for each analysis area delineated in the LRMP violate NEPA by artificially constraining the range of management alternatives, **precluding a no action alternative**, and frustrating NEPA's full disclosure objectives. In support of this argument they further contended that "Despite the fact that the FEIS has six alternatives and their respective differences are fully discussed, there are **only two real alternatives for leasing. None include the required No Action alternative."**

Policy Implications of Chief's Decision:

The range of the alternatives requiring analysis is determined by the scope of the proposed action. "Given the nature of the LRMP as a framework for management rather than as an absolute commitment to conducting a specific set of projects", the scope of the actions being considered in the LRMP does not involve an irretrievable commitment of resources. NEPA does not require a full discussion of land use alternatives whose implementation is remote or speculative.

The LRMP provides for a reasonable range of alternatives to display and articulate the potential environmental consequences of oil and gas activities on the Shoshone. **Alternative A reflects current management direction** as required by 36 CFR 219.12(f)(8), **and represents the "no action" alternative** as required under 40 CFR 1502.14(d).

Shoshone N.F. (Appeal 1552)

Selected Keywords: minerals, oil and gas, LRMP, decisions, MMR, no-action alternative.

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

FINAL DECISIONS ABOUT OIL AND GAS LEASING NOT MADE IN LRMP

Background:

Most appellants who raise issues having to do with the granting of mineral leases on National Forests as well as many Forest Service managers are often unaware that the Forest Service does not have the authority to issue such leases. This authority is reserved to the Secretary of the Interior who, however, may not issue any lease on National Forest System lands over the objection of the Secretary of Agriculture. The decision by the Secretary of Agriculture to object or not to object is, as a rule, based on the outcome of the prescribed procedures for ensuring conformance of Forest Service decisions with NFMA, NEPA and other relevant legislation.

Issue raised in Appeal:

The appellants contended that "by classifying roadless land for wilderness or non-wilderness management, the Panhandle planners decide where oil and leasing and associated activities may take place. Specifically, the Panhandle planners have decided through the forest planning process whether the Forest Service would issue any further leases for oil and gas in roadless lands or allow exploration and development on existing leases in these areas. **The plan thus represents the 'critical decision'** involving oil and gas activities in roadless areas for purposes of NEPA."

Policy Implications of Chief's Decision:

The assignment of a non-wilderness management prescription does not represent a decision not to object to oil and gas leasing in the area. Nothing in the management area prescription limits the Forest Service's discretion to object or not object to lease proposals. Therefore, **the assignment of a non-wilderness management prescription is not a 'critical decision'** requiring that the Forest Plan EIS contain a site-specific analysis of hypothetical lease proposals in roadless areas.

As is clearly stated in the Forest-wide management objectives, "before recommendations are made on any lease application, additional **NEPA site-specific analysis** of environmental effects will be made." This direction is repeated in the Forest-wide standards for minerals.

The [Forest Supervisor's] Record of Decision identifies management areas where oil and gas leasing is **likely to be compatible or incompatible** with the surface resource direction of the Forest Plan. However, the final decision on whether or not to object to particular leases will be based upon the Forest Plan standards and guidelines and **the additional site-specific analysis** required by the Forest Plan.

Idaho Panhandle N.F. (Appeal 2130)

Issue raised in Appeal:

"The Forest Service's policy of withholding land from mineral leasing ... is an unlawful withdrawal of land"

Policy Implications of Chief's Decision:

Decisions on whether to lease with certain stipulations or not to lease will be made after completing appropriate NEPA analysis and disclosure. As previously discussed, no final decisions on specific leases, applications for exploratory wells, or field development plans are made in the LRMP. These decisions will be made on a case-by-case basis, pending a later environmental analysis.

Shoshone (Appeal 1552)

Selected Keywords: lease, oil and gas, LRMP, decisions, minerals, non-wilderness allocation.

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

EXAMPLE OF AN ADEQUATE RANGE OF ALTERNATIVE WILDERNESS RECOMMENDATIONS

Background:

NEPA requires that Environmental Impact Statements attached to Forest Plans (FEIS's) include an examination and discussion of a wide range of alternative recommendations for designating various amounts of roadless areas within a Forest as Wilderness.

Issue raised in Appeal:

Appellants asserted that the FEIS failed to examine an adequate range of wilderness designation alternatives.

Policy Implications of Chief's Decision:

In the Chief's appeal decision this issue was addressed by instancing, for a range of alternatives, the number of acres and the percentage of the roadless resource recommended for wilderness designation, as follows: 0%, 8%, 15% (two alternatives, but different areas recommended), 16%, 17%, 30%, 44%, 46%, 75% and 100%.

This enumeration was followed by the statement: We conclude that **the range of alternative wilderness recommendations was sufficient** to permit a reasoned choice among alternatives.

Idaho Panhandle (Appeal 2130)

Selected Keywords: NEPA, range of alternatives, wilderness designation.

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

WORST CASE ANALYSIS OF UNLIKELY SCENARIOS IS NOT REQUIRED IN FEIS

Background:

One of the key requirements of NEPA is that the impacts of proposed actions on the environment and their consequences be fully disclosed. Due to scientific uncertainty, it is sometimes not possible to determine these consequences with any degree of accuracy. For those instances the original NEPA regulations required a so-called "worst case analysis", that is an assessment of the worst possible consequences that could occur (but see footnote).

Issue raised in Appeal:

The appellants contended that in order to comply with 40 CFR 1502.22, the Forest Service must prepare a worst case analysis for old growth, fisheries, and grizzly bear because there is not complete information or scientific certainty regarding these resources.

Policy Implications of Chief's Decision:

"The courts have rejected the notion that every conceivable environmental impact must be discussed in an EIS. Warm Springs Dam Task Force, 621 F.2d at 1026."

"The worst case scenarios which the appellants request are unnecessary because there would be no useful purpose in disclosing such remote and speculative environmental consequences. NO GWEN Alliance, 841 F.2d at 952. **The appellants request disclosure of worst case scenarios regarding old growth, fisheries, and grizzly bear situations that will clearly not occur during the planning period** (i.e., Forest-wide elimination of old growth, complete degradation of fisheries, and elimination of the grizzly bear)."

"[Neither] NEPA [nor] the CEQ regulations require that absolute certainty exist before a federal agency undertake a proposed action, **and certainly not a programmatic type decision** such as an LRMP approval."

Flathead (Appeal 1467/1513)

Footnote: The appellants were evidently not aware, and the Chief's Decision letter only made the point in the last paragraph quoted above, that a request for a worst case analysis is only meaningful in relation to decisions about proposed actions -- that is to say, project level decisions. Because they are programmatic, Forest plan decisions do not, as a rule, specify where project level actions will take place, nor do they provide details which would allow assessments of the actions' adverse environmental impacts.

In a recent revision of the regulations the requirement for a "risk analysis" has been substituted for worst case analysis: it calls for an assessment of a reasonable range of risks likely to arise as a result of proposed actions.

The substitution is intended to preclude arguments about the extreme scenarios exemplified above (elimination of old growth, total degradation of fisheries, elimination of the grizzly bear).

Selected Keywords: NEPA, worst case analysis, risk analysis, old growth, fisheies, grizzly bear.

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

FOREST-WIDE MITIGATION MEASURES ARE CONTAINED IN MANAGEMENT AREA STANDARDS

Background:

One of the NEPA requirements is that Environmental Impact Statements not merely disclose the impact of proposed actions and their environmental consequences but that they also describe and document the measures that will be taken to reduce or mitigate anticipated harmful effects. While Forest Plans indicate the kind of actions that are proposed, they do not specify in any detail where the proposed actions will take place nor what form they will take. As regards mitigation measures, these too need only be considered in more general terms in Forest EIS's. The Chief's appeal decision paraphrased below specifies what is to be understood by more general terms.

Issue raised in Appeal:

The appellants contended that the Forest Service has failed to demonstrate that a site-specific evaluation of mitigation measures has been considered or documented.

Policy Implications of Chief's Decision:

The Forest Plan forest-wide management direction contains a multitude of various resource protection requirements. These **resource protection measures may also be considered mitigation measures.** Because they apply generally to the Forests, they are not site-specific. The Forest Plan contains **resource protection measures in the form of management area standards.** These also are not site-specific because management areas typically cover hundreds or thousands of acres.

Idaho Panhandle N.F.(Appeal 2130)

Selected Keywords: mitigations, resource protection, standards, LRMP.

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

LOCATION AND EXTENT OF ROADS AND CLOSURES NOT DECIDED IN LRMP

Background:

There is some confusion about the distinction between the LRMP decisions on the transportation system and project decisions about specific roads that are part of that system.

Issue raised in Appeal:

Appellants allege that the LRMP should give an accurate picture of which roads will be closed, where ORV use will occur and the location of timber sales.

Policy Implications of Chief's Decision:

The chief decided that the "EIS discusses generally the transportation system projected for several specific roads, but that alternative locations, exact specifications and management of local roads will be analyzed during more detailed planning for the implementation of the transportation system. "Any final decision regarding roads constructed or upgraded to meet management objectives will be based on a project environmental analysis which will address site-specific impacts and and will be consistent"with the LRMP.

"Detailed site-specific decision and concomitant impacts are beyond the scope of the plan....such decision are more properly addressed at the project level."

Routt NF (Appeal 1010)

Selected Keywords: Roads, road closure, LRMP decision, RARE II

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

2. DECISIONS PERTAINING TO RECREATION

OPTIONAL CLASSIFICATION SYSTEM FOR REALLOCATING RECREATION RESIDENCE FEES

Background:

The Regional Forester's fee adjustment decisions were based on a 5% assessment of the fair market value of the permitted lots, this value being determined by "comparison of the amenities provided by the physical characteristics of the lots and their suroundings, to transaction evidence covering sales of similar lots to be used for similar purposes". Such appraisals will not include adjustments for normal permit constraints and restrictions.

Interim Directive 1, FSH 2709.11, August 17, 1988 provides revised direction and procedures for recreation residence fees. In particular section 33.1 (Base Fees and Indexing) provides for determining the beginning fee and subsequent fees under a 20 year cycle. On 6/1/1989 the Chief issued Interim Directive 3, FSH 2709.11 which is almost identical with the above Interim Directive 1.

Issue Raised in Appeal:

Fee increases and the method used in establishing the fees were challenged in 89 appeals involving 71 recreation residence sites in Sciots Tract, and 927 sites in 41 other tracts on the Eldorado N.F.

Policy Implications of Chief's Decision:

The appeal decision establishes an optional appraisal method for reallocating fees among permittees, denoted Site Classification System (SCS). Permittees who do not wish to use it will have their fees based on other newly established site values.

Eldorado Fee Appeals 10/24/86

Selected Keywords: Site Classification System, SCS, Eldorado Fee Appeal, Summer Home, Recreation Residence Fee

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

WALK-IN SKIING PROVIDES SEMI-PRIMITIVE EXPERIENCE, AVOIDS COMMERCIALIZATION

Background:

The terms semi-primitive, non-motorized recreation are defined so as to allow some latitude of interpretation.

Issue Raised in Appeal:

Does a walk-in skiing experience comply with the LRMP direction to provide semi-primitive recreation experience opportunities ?

Policy Implications of Chief's Decision:

A walk-in skiing experience and avoiding commercialization of winter activities on National Forest Lands **is a way to achieve** the LRMP direction to provide for **"semi-primitive, nonmorotized recreation experience** characterized by independence, closeness to nature, tranquility, and self-reliance through application of outdoor skills".

White Mountain N.F.(Appeal 2086)

Selected Keywords: walk-in skiing, semi-primitive, non-motorized, commercialization

Recommended Disposition: Clarification only, amendment in FSM not warranted, broadly applicable.

A FOOT TRAIL IS NOT AN IMPROVEMENT UNDER THE SMALL TRACTS ACT

Background:

Under the implementing regulations of the Small Tracts Act (36 CFR 254.30-44), certain classes of property improvements could qualify a parcel for conveyance from the Federal government to others.

Issue Raised in Appeal:

Appellant asserts that a foot trail qualifies as an eligible improvement, and that such a trail having been constructed qualifies a parcel for conveyance from the government to the appellant.

Policy Implications of Chief's Decision:

The Chief's appeal decision stipulates that a foot trail does not qualify as an eligible improvement for such conveyance.

Trinity River, Region 5 (Appeal 2381)

Selected Keywords: Small Tracts Act, improvement, fixtures, structures, attendant facilities

Recommended Disposition: Clarification only, amendment in FSM not warranted, broadly applicable.

TERM PERMITS APPLY TO RECREATION RESIDENCES, NOT TO ISOLATED CABINS

Background:

There is no provision in the law which authorizes issuance of term permits for isolated cabins. The Congress clearly intended that cabins on invalid mining claims be removed from Federal lands. Until 1971, qualified applicants could lease or purchase up to 5 acres of land containing their improvements at fair market value. While permits of varying tenures were issued under Section 4 of the Mining Claims Occupancy Act of 1962 (30 USC 701-708), such permits provided for removal of improvements at the close of the use period.

Recreation residence designation applies to residences that occupy planned, approved tracts established for such use. Furthermore, FSM 2345 provides that no new recreation residence tracts would be approved.

Issue Raised in Appeal:

Appellant took issue with the Supervisor's decision to convert a recreation residence permit with a 10 year term to a non-extendible, isolated cabin permit. The appellant argued that the action was arbitrary and capricious.

Policy Implications of Chief's Decision:

Unauthorized cabins on invalid mining claims are not the same as recreation residences in tracts. There is no provision for issuing term permits for isolated cabins. Hence, tenure longer than 1 year is not guaranteed.

Klamath NF (Appeal 1392)

Selected Keywords: Recreation Residence, Unauthorized cabins, Invalid mining claims, tenure

Recommended Disposition: Clarification only, amendment in FSM not warranted, narrowly applicable.

RIVER USAGE NEED NOT BE LIMITED WHERE FISHERY IS NOT IN STEEP DECLINE

Background:

Floating use has the potential for conflict with fisheries. Floating use is governed by the Forest Service, whereas fisheries are the province of the State. Both parties bear responsibility for the vitality of the resources.

Issue Raised in Appeal:

May the Forest Service delay acting on a threat to a fishery until a State government acts?

Policy Implications of Chief's Decision:

Immediate danger to the fishery is equated to a period of steep decline in the fishery. In the absence of such a decline, there is no immediate danger to the fishery and there is no need, therefore, to place limits on floating use. (Note that the language is framed in such a way as to set up a criterion for what constitutes immediate danger, namely a period of steep decline in the fishery.)

The Montana State has several available options that should be exercised before the Forest Service acts. Such options deal directly with the fish and their habitat, whereas the Forest Service option of limiting usage deals only indirectly with a potential threat to the fishery. **The Chief's position is that the Montana State government must take actions before the Forest Service does.**

Flathead N.F. (Appeals 1785 & 1787)

Selected Keywords: Wild and Scenic Rivers, Freedom of Choice, Carrying Capacity, Limits of Acceptable Change (LAC)

Recommended Disposition: Clarification only, amendment in FSM not warranted, broadly applicable.

3. DECISIONS PERTAINING TO SPECIAL USES

PRIVILEGES GRANTED BY SPECIAL USE PERMIT ARE NOT ABSOLUTE

Background:

Outfitters may be granted special use permits allowing them to set up base camps in suitable places. The privilege afforded by the use permit is apt to be viewed by outfitters as absolute in the sense that, once granted, the conditions attaching to the use permit at the time of issue, including changes in camp location, may not be changed by the agency.

Issue Raised in Appeal:

Appellant contested the requirement in the (Plan) amendment that, upon sale of his business and the subsequent transfer of his permit to the new owner, his outfitter base camp in the river corridor must be relocated outside the corridor during the river float season. He contended that requiring movement of the base camp out of the corridor during the float season at the time he sells his business denied him permit transfer rights.

Policy Implications of Chief's Decision:

The rights and privileges granted to outfitters by a special use permit allowing them freedom in locating their base camps are not abridged by the requirement that the camps be removed from a river corridor when it becomes necessary to protect it.

Flathead N.F. (Appeals 1785 & 1787)

Selected Keywords: Wild and Scenic Rivers, Outfitters, Base Camps, Carrying Capacity

Recommended Disposition: Clarification only, amendment in FSM not warranted, broadly applicable.

A GOLF COURSE MAY BE A PERMITTED USE OF NATIONAL FOREST LANDS

Background:

Established Forest Service policy stipulates that services provided by National Forest resorts should be related to natural resources, and by the same token discourages the introduction of urban recreation facilities into natural environments. Community and private lands are the appropriate settings for urban facilities which enable what are denoted as Level 5 recreational experiences.

In the given case, the Regional Forester responded to an application for a special use permit to create a golf course on Forest Service land by adopting a partial amendment of a Forest Plan that would allow for the development of recreation experience Level 5 activities. Reason: The surrounding area had undergone development to the point where the piece of land under Forest Service jurisdiction could no longer be considered to be located in a natural setting.

Issue Raised in Appeal:

Appellant sought reversal of the Regional Forester's decision to approve amendment of the Forest Plan on the grounds that the proposed change in land use classification to allow the presence of Level 5 recreational experiences violates Forest Service policy (as well as having undesirable environmental and socio-economic consequences).

Policy Implications of Chief's Decision:

"Based upon our review of the record, we find **the decision of the Regional Forester is in compliance with applicable laws, regulations, and policy...** This decision only approves amendment of the...Plan to, among other things, allow for the development of Recreation Experience Level 5 activities... **This decision does not approve a golf course.** Prior to any decision on a specific facility, a site specific environmental analysis must be made. In the case of a proposal for a golf course, should further analysis disclose no adverse environmental effects, **the Regional Forester is directed to consult with this office on policy ramifications prior to project approval.**

[The record showed the portion of Forest Service land **"to be virtually surrounded by the airport, a four lane major highway, several gravel pits, an industrial park, and other urban type facilities."** The piece of National Forest land in question might appropriately be considered for **exchange for other land** more suited for National Forest purposes. This option **should be considered** by the Regional Forester.]

Inyo N.F. (Appeal 1956)

Selected Keywords: Level 5 recreation usage, Golf Course, non-natural setting

Recommended Disposition: Clarification only, amendment in FSM not warranted, narrowly applicable.

ACTUAL AMOUNTS OF STREAMFLOW ARE CRITICAL FOR HYDROPOWER DEVELOPMENT DECISIONS

Background:

Actual amounts of streamflow are critical for the decision to allow or disallow small hydropower developments on National Forest land, and must therefore be supported by adequate data in Environmental Assessments, as well as being evaluated and considered in the devising of alternatives and discussion of possible mitigations.

Issue Raised in Appeal:

The issue centers around the potential impact of a small hydropower development on National Forest land on the native fishery and on the natural hydrologic function of a stream. Appellant asserts that only 2.5 cubic feet per second are needed for fish habitat maintenance, whereas the Regional Forester asserts that 4.7 cubic feet per second are needed to comply with the LRMP direction.

Policy Implications of Chief's Decision:

The actual stream flow amounts at issue in this appeal are not considered in the Assessment. The Forest Supervisor's decision to select the "No Action" alternative and deny the SUA rests on data that were not evaluated in the supporting EA for the decision, and thus were not subject to the scrutiny required by Forest Service policy directives on SUA's, NEPA, and hydropower developments.

A Forest Officer's decision rejecting (or approving) an application for a special use permit must be based on a reasoned analysis of the factors involved, with due regard to its compatibility with the purposes for which the lands are managed, the public interest, and the applicant's qualifications. The proposed use must meet a public need and be compatible with National Forest resource needs. Such analysis must be appropriately documented.

The Forest Supervisor should work with the State Division of Wildlife Resources (DWR), and with SDC, to accomplish needed instream flow studies referred to by the DWR and to determine the extent of wild trout production.

Physical, biological, economic, and social factors should be considered for each alternative, and the specific environmental protection measures (mitigation factors) identified and incorporated in the special use authorization.

Wasatch-Cache NF (Appeal 1972)

Selected Keywords: Hydropower, Environmental Assessment, Stream flow amount, fish habitat

Recommended Disposition: Amendment in FSM warranted, narrowly applicable.

SPECIAL USE PERMITS THAT BENEFIT THE PUBLIC HAVE PREFERENTIAL TREATMENT

Background:

Forest Service policy is not to approve special use applications for private use of National Forest land if location or development on other land is reasonably possible nor issue an authorization to merely accommodate the wishes of an individual applicant. Preference is given to special use authorizations that offer service or benefit to the public over single-purpose or private uses. While not explicitly stated, such preference is implicit in CFR 219.

Issue Raised in Appeal:

Appellant contested the Regional Forester's decision to issue a special use authorization allowing a facility of the Smithsonian Institution Astrophysical Observatory to develop a base camp on National Forest land. In the view of the appellant the planned use is inconsistent with National Forest purposes.

Policy Implications of Chief's Decision:

"In this appeal, the applicant [for a special use authorization] is a public agency and the use is for public benefit, thus detailed consideration of the proposed use is not inconsistent with our special use policies."

"The approval decision benefits the agencies and the public. For the Forest Service, this means doing a better job of meeting the demand for public recreation and interpretive opportunities in the National Forest. For these reasons, the proposed project is an appropriate use of National Forest land."

Coronado N.F. (Appeal 2082)

Selected Keywords: Special use permit, preference, public benefit, discretion

Recommended Disposition: Clarification only, amendment in FSM not warranted, broadly applicable.

HIGH HAZARD RISK LIABILITY OF $1 MILLION IS JUSTIFIED

Background:

Section 504(h) of the Federal Land Policy and Management Act of 1976 (FLPMA) requires that a no-fault liability provision specify a maximum limitation on damages commensurate with the foreseeable risks and hazards presented. The issuing officer is responsible for making the necessary risk assessment and setting the maximum strict liability limit for overhead powerlines. The final dollar amount is an administrative determination based on an assessment, and pertinent Forest Service management information concerning the holder's use and occupancy. The no-fault liability amount stemmed from a review of costs and losses due to powerline fires in eastern Oregon National Forests over a recent 5 year period.

Issue Raised in Appeal:

Appellant asserted that the strict liability amount should be based on the average cost per fire during the review period, reduced by damage reimbursement payments to the Forest Service, and the economic hardship stemming from such alternative permit requirements as underground burial of power lines or a high no-fault liability limitation.

Appellant further asserted that its insurance carrier no longer offers strict liability coverage, and that, unless relief is given by the Forest Service, electrical powerlines serving Forest Service permittees only may have to be terminated unless the permittees affected agreed to absorb the added costs.

Policy Implications of Chief's Decision:

"Economic hardship" and "averaged costs" are not sound criteria to use in justifying a strict liability limit below the $1,000,000 maximum prescribed by the Secretary at 36 CFR 251.56(d)(2). Both criteria burden the public with an unjustified part of the damage potential which could reasonably be anticipated to occur to the National Forest as a result of a powerline fire.

The record shows that one powerline fire on the Deschutes National Forest cost nearly $300,000 in fire suppression costs and resource damage. The cost of this fire is the highest recorded in the Regional Forester's 5-year listing of powerline fires; and thus should have served as a reasonable starting point in the Regional Forester's risk assessment equation.

Fire suppression costs and resource damage potential should be considered without regard to ownership at the point of origin or to cost reimbursement. Furthermore, the lack of available no-fault liability insurance coverage is not a pertinent factor in establishing risk."

We believe strongly that holders placing a high risk use on National forest land should assume responsibility for the full extent of damages that can be reasonably anticipated as a result of the hazards created. In our judgment, the full $1,000,000 limit shall be used unless a lower figure is clearly justified.

Deshutes NF (Appeal 2013)

Selected Keywords: Liability limit, special use authorization, powerlines, no-fault, fire risk, cost per fire

Recommended Disposition: Clarification only, amendment in FSM not warranted, narrowly applicable.

4. DECISIONS PERTAINING TO TIMBER MANAGEMENT

CUMULATIVE EFFECTS ANALYSIS OF REASONABLY FORESEEABLE ACTIONS MAY BE CONFINED TO PROJECTS IN THE CURRENT PLANNING PERIOD

Background:

Cumulative effect or impact is defined in the CEQ Regulations as "the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions". Analyses of cumulative effects must be made, and their results presented in Environmental Assessments or Environmental Impact Statements. How far into the future are actions to be considered reasonably foreseeable is not, however, defined either in the CEQ or the Forest Service regulations.

Issue Raised in Appeal:

The Appellant questioned whether cumulative effects were considered in the Environmental Analysis, implying that the impacts of timber sales planned for the reasonably foreseeable future had not been adequately assessed.

Policy Implications of Chief's Decision:

In the appeal decision, the Chief pointed out that the cumulative effects of the timber sale (which was evidently at the core of the issue raised by the appellant), and of other past, present and reasonably foreseeable future actions on the wildlife, watershed and visual resources had been appropriately considered by the Forest Supervisor. Regarding the 50-year financial analysis which was carried out as part of the planning process, its purpose was to help design harvest projections that would be most compatible with long-term management under the Forest Plan.

The Environmental Assessment which includes the cumulative effects analysis was confined to the current planning period during which "no additional sales are included in the analysis area".

Beaverhead N.F. (Appeal 2467)

Selected Keywords: cumulative effects, reasonably foreseeable actions, harvest projection, suitability, first entry, PNV

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

AN IMPENDING TIMBER SALE IS NOT A BELOW-COST PROPOSAL IF THE INITIAL ENTRY SHOWS A POSITIVE PRESENT NET VALUE. LONG-TERM ECONOMIC ANALYSIS AT THE PROJECT LEVEL IS USEFUL PRIMARILY FOR ASSESSING THE RELATIVE ECONOMIC EFFICIENCY OF ALTERNATIVES

Background:

At the project level, the economic analysis for an individual timber sale deals with the land concerned as if it were isolated in a class by itself. It is entirely possible for the economic analysis to **show a positive return over the short term** (say, 5 years within which a sale might be completed). **And show a negative return over the planning horizon**, the overall time period considered in the planning process, usually (as in the present case) 50 years.

Issue Raised in Appeal:

The Appellant --

Suggested that the economic analysis conducted as part of the environmental analysis (for a specific timber sale) may not have been adequate;

Expressed doubt as to whether the proceeds of the sale would be greater than the associated costs;

Intimated that the deciding officer had failed to follow regional policy concerning **below-cost timber sales.**

Policy Implications of Chief's Decision:

In his appeal decision the Chief pointed out that the economic efficiency of management actions was a major issue considered in the environmental analysis. Accordingly, short and long-term economic analyses were made as part of this analysis. **The economics of the initial entry showed a positive value.** The analysis did show a negative value for long-term Present Net Value (PNV); for this analysis current market values were used which are unpredictable over the long term. In any case, **"long-term economic analysis at the project level is useful primarily to assess the relative economic efficiency of alternatives."** The Chief also noted that "there is no requirement that individual sales be above cost."

Beaverhead N.F. (Appeal 2467)

Selected Keywords: land suitability, planning horizon, cost efficiency, economic efficiency, PNV, project level economic analysis, FORPLAN, positive return, below cost sales

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

IMPLEMENTING THE 2 INCH SCALING RULE WILL HAVE NEGLIGIBLE EFFECTS

Background:

In November 1987, the Regional Forester in Region 5 ordered implementation of the 2-inch scaling rule for merchantable incense cedar. The pre-revision scaling rule provided for deducting as unmerchantable the part of volume encompassed by so-called "pecky rot" defects on log ends that are 5 inches apart or closer. Following a study by the Pacific Northwest Research Station which concluded that "all Scribner scaling options overdeducted for the presence of pecky rot" and that "the 1 3/4-inch rule performed best", the allowable deduction distance between defects was reduced to 2 inches.

Issue raised in Appeal:

Appellant contended that implementation of the new rule will have significant adverse effects on the way operations are conducted, with implications for harvesting methods and with adverse environmental and economic consequences for operators.

Policy Implications of Chief's Decision:

Implementing the 2 inch scaling rule will have only negligible or insignificant effect on such items as: lumber recovery, overrun, manufacturing costs, logging costs and stumpage prices. It has been estimated that the net scaled volume will increase by 4 percent and there may be slight increase in the colume of material removed from the woods. It will also have negligible effects on timber sale administration conflict.

Region 5 (Appeal 2271)

Selected Keywords: log scaling rule, 2 inch rule, lumber recovery, overrun, manufacturing cost, logging cost, stumpage prices

Recommended Disposition: Clarification only, amendment in FSM not warranted, broadly applicable.

AUTHORITY TO SIGN NEPA DOCUMENTS FOR A PROJECT AND IMPLEMENT IT GO TOGETHER

Background:

NEPA requires that a FONSI/DN be signed by the "Responsible Federal Official". This designation that also carries with the authority to act on the project that is the subject of the NEPA documentation.

Issue Raised in Appeal:

Appellant contended that decisions regarding large scale timber sales, including the signing of NEPA documentation relating to such sales, are too critical to be delegated to a District Ranger.

Policy Implications of Chief's Decision:

The Chief confirmed the policy principle that "**the line officer authorized to conduct a project is also the "Responsible Federal Official" for that project under NEPA.** Accordingly , the line officer with project authority has the concomitant NEPA responsibility." [However, the Chief conceded, without prejudice to this principle, "that the sales at issue exceeded the Ranger's sale authority, and that the corresponding delegation of NEPA responsibility was in error".]

Klamath N. F. (Appeal 2468)

Selected Keywords: Authority, responsible official, concommitant authority, delegation

Recommended Disposition: Clarification only, amendment in FSM not warranted, broadly applicable.

FAILURE TO DISCUSS CUMULATIVE EFFECTS UNDER A SEPARATE HEADING DOES NOT RENDER AN ENVIRONMENTAL ASSESSMENT DEFICIENT

Background:

Paragraph 1508.25 of the CEQ Regulations requires federal agencies to consider three types of actions, three types of alternatives and three types of impacts in order to determine the scope of NEPA documentation. Cumulative actions, one of the three types of actions named, are defined as those **"which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement".** Nowhere in the regulations is there a requirement, implicit or explicit, that cumulative or any of the other actions, or, for that matter, any of the three types of alternatives and impacts, have to be discussed under separate headings.

Issue Raised in Appeal:

Appellant contested a timber sale decision confirmed by the Regional Forester on the grounds that the Environmental Assessment fell short in several respects of NEPA requirements. One of its deficiencies was that potential cumulative effects had not been adequately considered **as evidenced by the absence of a separate heading to identify this discussion.**

Policy Implications of Chief's Decision:

The Chief agreed that the Environmental Assessment in question "makes no specific mention of a "cumulative effects" analysis having taken place", but goes on to say that **"...an EA is not deficient simply because it does not include a "Cumulative Effects" heading,..."**
[The EA was, nevertheless, found by the Chief to have been deficient in a number of respects, including inadequate consideration having been given to potential cumulative effects.]

Tahoe N.F. (Appeal 1939)

Selected Keywords: cumulative effects, NEPA, EA

Recommended Disposition: Clarification only, amendment in FSM not warranted, broadly applicable.

THE SIGNIFICANCE OF PROPOSED ACTIONS IS DETERMINED BY: MULTIPROJECTS, MULTISALES, ROADLESS AREAS, SENSITIVE WILDLIFE HABITATS

Background:

In the wording of paragraph 1508.27 of the CEQ Regulations, the term "significantly" in relation to proposed actions requires consideration of both context and intensity. The main requirements under these two factors were summarized in a recent Federal Court opinion as follows:

- the action is highly controversial;
- its effects are highly uncertain or involve unique or unknown risks;
- the action is related to other actions with cumulatively significant impacts
- the action threatens a violation of another environmental law.

Issue Raised in Appeal:

Appellant contended that the EA for proposed timber sales did not sufficiently consider the significance of these actions in their impact on the environment.

Policy Implications of Chief's Decision:

In considering the sufficiency of an EA with respect to these factors, the Chief has decided that the presence of the following features is relevant:

the compartment EA is for multiprojects and multisales
a portion of the area is within a roadless area
sensitive wildlife species (spotted owl, pileated woodpecker) habitats are within the compartment

[The Chief agreed with the Appellants' contention that the above "significance" requirements had not been adequately considered in the EA under appeal]

Tahoe N.F. (Appeal 1939)

Selected Keywords: significance, NEPA, controversial, uncertain effects, cumulative effects, jeopardizes another environmental law, wildlife habitat, spotted owl, pileated woodpecker, roadless area, multiple sales

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

NEPA DOCUMENTS MIGHT BE INVALID BECAUSE THEY ARE OUTDATED

Background:

The CEQ Regulations do not explicitly deal with the possibility of a NEPA document becoming outdated. To specify the loss of validity of this documentation in terms of the period elapsing between issuance and implementation of the actions covered might have seemed inappropriate when the Regulations were drafted as the mere lapse of time is irrelevant. What matters is the extent and significance of intervening events and changes in circumstances which cannot be expressed in the simple terms of number of years. Nevertheless it would not be unreasonable to stipulate that every such document should be reviewed for validity if, say, 5 years had elapsed between issuance and date when the action is due to begin.

Issue Raised in Appeal:

Appelant contended that the EA issued for a timber sale was 6 years old and its content was no longer in compliance with NEPA requirements.

Policy Implications of Chief's Decision:

The Chief stated that "**Some very important court rulings have occurred since the preparation of the original EA**" and decided that "When there is a **long delay** between preparation of the NEPA documents and the sale date, a documented review of the documents, with appropriate public participation, must be made."

Tahoe N.F. (Appeal 1939)

Selected Keywords: effective age, EA, delay, outdated court rulings

Recommended Disposition: Clarification only, narrowly applicable.

REASONABLE ALTERNATIVES MAY GO BEYOND CURRENT MANAGEMENT DIRECTION

Background:

On the question of what constitutes a reasonable alternative in the context of the NEPA requirement for documented analyses of alternative uses of available resources, neither the CEQ Regulations nor the accumulated Court opinions have given clear guidance. While the Regulations (40 CFR 1502.14) merely provide for the examination of a reasonable range of alternatives, a good example of the Courts' view is the following statement taken from the RARE II case: "If an agency need not consider every conceivable alternative, neither may it ignore obvious alternatives". In effect, the burden is placed on the plaintiff to demonstrate that a reasonable alternative was not covered in a NEPA document. Thereafter, however, it is up to the agency to provide a explanation acceptable to the Court of the alternative having been left out because it was not reasonable. In the RARE II case the Court insisted that "Congress and others need this explanation as a way to check on the validity of the conclusions."

Issue Raised in Appeal:

Appellant contested the validity of the initial Forest Service case that the range of alternatives in the EA was reasonable because these alternatives were developed to accomplish the objectives given in the 1978 Timber Management plan, and that alternatives beyond that were unreasonable.

Policy Implications of Chief's Decision:

The Chief agreed with the appellant that the Forest was not necessarily constrained to the management emphasis identified in the TM plan and overturned a project decision because the range of alternatives in the EA was insufficient. In his letter to the Regional Forester, the Chief further explained that "In certain instances it may be incumbent on the responsible official to review the management emphasis assigned to an area by including an alternative that would change the management emphasis. This is particularly true when dealing with old, functional plans. The TM Plan should not be viewed as an administrative staightjacket that absolutely prohibits the Forest from reexamining its previous decisionmaking or prohibiting adjustments that it feels are necessary in light of new information, technologies, or other changed circumstances. The fact that an alternative is inconsistent with the current emphasis does not automatically foreclose such an option."

Tahoe N.F. (Appeal 1939)

Selected Keywords: range of alternatives, no-action alternative, NEPA, timber sale

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

5. DECISIONS PERTAINING TO ENGINEERING

FAILURE TO EXTEND ROAD CLOSURES NOT A VIOLATION OF NEPA

Background:

Road closures are one of seven categories of actions of an administrative nature which are excluded from environmental documentation under Section 40 CFR 1508.40 of the CEQ Regulations. The provision allowing such Categorial Exclusions is based on the assumption that an administrative action is unlikely to have significant environmental effects. However, to make sure, the Section contains the stipulation that "Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." For such actions environmental documents, either EA's or EIS's, have to be prepared.

Issue Raised in Appeal:

Appellants expressed concern about the resource damage done by illegal ORV uses, and contended that Forest Supervisor's refusal to modify the road closure orders by making them more restrictive was in violation of NEPA (as well as of certain Executive Orders and of the Forest Plan).

Policy Implications of Chief's Decision:

The Chief's appeal decision was to the effect that **NEPA was satisfied, since the road closure order falls within the authorized listing of actions that may be categorically excluded from NEPA documentation.**
[However, the Chief acknowledged on the basis of the Record that damage to the resource was occurring as a result of illegal ORV use in the area instanced by the appellants, and agreed with the appellants that ORV management in the area needs to improve. Accordingly the Regional Forester was directed to ensure that increased emphasis, within the resources available, is given to resolving these problems]

Shawnee N.F. (Appeal 2233)

Selected Keywords: Categorical Exclusion, NEPA, Road closure, ORV; EO 11644, EO11989, 36 CFR 295, 36 CRF 212, 36 CFR 261.54

Recommended Disposition: Clarification only, amendment in FSM not warranted, broadly applicable.

LIMITS ON TIMBER HAULING ON NF ROADS IS NOT A CHANGE IN SALE CONTRACT

Background:

The Forest Supervisor has the authority and responsibility to manage the Forest Development Road System for public safety and for resource and investment protection. Some timber sale contractors

Issue Raised in Appeal:

Appellants contested the Regional Forester's decision to affirm, with amendments, the Forest Supervisor's decision to issue an order regulating Forest Development Road use. The appellant contended (through 15 individual points) that the order modified the terms of existing Timber Sale Contracts. The relief requested that the Road Order provide an exemption for road use associated with existing Timber Sale Contracts.

Policy Implications of Chief's Decision:

The Road Order is in accordance with 36 CFR 261 and does not modify the terms of existing Timber Sale Contracts. The appeal record did not support any substantive reason why the road order should not be implemented or applied to existing Timber Sale Contracts. The Chief affirmed the Regional Forester's decision.

Black Hills N.F. (Appeal 02031047)

Selected Keywords: Road Order, timber sale contract, timber haul, 36 CFR 261

Recommended Disposition: Clarification only, amendment in FSM not warranted, narrowly applicable.

A ROAD MAY BE BUILT IN A ROADED AREA WITHOUT A WILDERNESS REVIEW

Background:

The RARE II 9th Circuit Court decision (California vs. Block) require that road construction projects in roadless areas must be preceded by a wilderness review and full public involvement process.

Issue Raised in Appeal:

Appellant contested Supervisor's decision to construct a 200-foot long road as a tie between two existing gravel roads, contending that:
the 9th Circuit Court RARE II decision applied;
the area affected had not had an adequate wilderness review; and
public involvement preceding the decision had been inadequate.

Policy Implications of Chief's Decision:

Chief found that the area in which the project is proposed is covered by a 1977 Land Management/Timber plan and EIS. The Plan was appealed, and in 1978 was found to be adequate. The area was reviewed in the RARE II process but not studied because it did not meet national criteria as a roadless area. Recent Statewide wilderness legislation (HR 1149) did not include the area.

Preparation of the 1977 plan included appropriate public involvement. No additional involvement other than publication of the Supervisor decision in local newspapers was necessary.

Because the area was not studied in RARE II and not included in the RARE II EIS, the 9th Circuit Court decision in California v. Block does not apply.

Willamette N.F. (Appeal 06180959)

Selected Keywords: RARE II, roadless area, roaded area, tie road, wilderness review, NEPA, California v. Block

Recommended Disposition: Clarification only, amendment in FSM not warranted, broadly applicable.

HARVEST RESTRICTIONS AND ROAD CLOSURES MITIGATE IMPACT OF TIMBER SALE

Background:

Mitigations of adverse environmental impacts are defined in the CEQ Regulations under 1508.20 as follows:

-- Avoiding the impact by not taking a certain action or part of an action;

-- Minimizing impacts by limiting the degree or magnitude of the action and its implementation;

-- Rectifying the impact by repairing, rehabilitating or restoring the affected environment;

-- Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action;

-- Compensating for the impact by replacing or providing substitute resources or environments.

Issue Raised in Appeal:

Appellant expressed concern about the impact of a timber sale on elk habitat as harvesting reduces the amount of elk security cover and increases the probability of big game animals being harvested or displaced during hunting season.

Policy Implications of Chief's Decision:

"Specific effects on elk and elk habitat are discussed in the EA and include specific mitigation such as harvest restrictions and road closures."

Beaverhead N.F. (Appeal 2467)

Selected Keywords: mitigations, harvest restrictions, road closures

Recommended Disposition: Amendment of FSM is not warranted, broadly applicable.

NON-SYSTEM ROADS MUST BE REVEGETATED WITHIN 10 YEARS

Background:

Under Section 8(b) of The National Forest Management Act, as well as under 36 CFR 219.27(a)(11), Forests are required to inventory and revegetate temporary roads within 10 years.

Issue raised in Appeal:

The appellants contended that the Flathead N.F. LRMP did not comply with the requirements laid down in the above Sections.

Policy Implications of Chief's Decision:

In his appeal decision, the Chief quoted the Regional Forester's response statement to the effect "that the Forest would amend the LRMP to require that **all non-system roads constructed in the planning period be revegetated within 10 years of completion of the contract, lease or permit** through which they were constructed", and directed that the LRMP be amended as stated.

Flathead N.F. (Appeal 1467/1513)

Selected Keywords: revegetation, roads, non-system, inventory.

Recommended Disposition: Clarification only, amendment in FSM not warranted, broadly applicable.

INTERIM ROAD DENSITY STANDARD FOR GRIZZLY BEAR HABITAT:
ONE MILE PER SQUARE MILE

Background:

Under Section 9 of the Endangered Species Act (ESA) any resource management activity that modifies a species' habitat constitutes a "taking" and is forbidden. Although it is nowhere stated whether a change in the density of a road network constitutes such a modification, and thus a "taking", a biological opinion provided by the Fish and Wildlife Service recommended "as interim direction until a cumulative effects model is operational, maintaining an open road density of one mile per square mile or less in MS1 grizzly bear habitat."

Issue raised in Appeal:

Appellants expressed concern that roading practices identified in the LRMP would have a detrimental effect on grizzly bear habitat that would constitute a "taking" under ESA, making reference to the omission from the LRMP of the standard recommended as interim direction in the FWS biological opinion.

Policy Implications of Chief's Decision:

"We do not find specific wording in the LRMP regarding an open road density for MS1 grizzly bear habitat. Therefore, the Regional Forester is directed to clarify the point by amending the LRMP to **incorporate an open road density standard for all MS1 grizzly bear habitat of one mile per square mile or less** until such time as a cumulative effects model is operational or further consultation with FWS determines otherwise."

Flathead (Appeal 1467/1513)

Selected Keywords: grizzly bear, road density, cumulative effects, ESA

Recommended Disposition: Amendment in FSM warranted, broadly applicable.

APPENDIX C: PROPOSED INTERIM DIRECTIVE

This interim directive addresses the scope and applicability of appeal decisions rendered by Reviewing Officers, and sets forth the limitations on issuing appeal decisions inconsistent with current direction in the Forest Service Directive System. Although the policy on scope and applicability of appeal decisions is not new, it has not been made explicit in the Forest Service Manual. As a result, there is continuing uncertainty both among agency personnel and among external parties as to whether a given appeal decision is binding on the unit directly involved in the appeal only, or on other units as well.

1571.2 - Appeal Decisions. An appeal decision is generally intended to be binding only on the Deciding Officer whose decision has been appealed and the unit involved, unless, as part of the appeal decision, the Reviewing Officer orders and causes to be prepared a revision of current direction that would make the decision applicable, in whole or in part, to all other like units.

A Reviewing Officer shall not issue an appeal decision, or order an action as part of an appeal decision, that is inconsistent with current direction issued through the Forest Service Directive System, unless the decision letter orders current revision of the relevant directives.

Revision of current direction as part of an appeal decision can only occur where the Reviewing Officer has the delegated authority to approve and issue the revised directive. For example, where a Forest Supervisor is the Reviewing Officer in an appeal of a decision by a District Ranger, the Forest Supervisor could order revision of forest supplements to the Manual and/or handbooks but could not order revision of Regional supplements or Service-wide directives issued by the Chief.

Revision of agency directives as an element of an appeal decision should occur rarely, especially at the Regional or Washington Office levels. Instead, line officers should continue to rely principally on the ongoing program and management review system (FSM 1410) and monitoring and administration of the overall appeals process for identifying needed changes in Service-wide policy and procedure.